

Islamic Law in Theory and Practice

Introduction to Islamic Law

Ahmed Akgunduz



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"The world today has become one large village. Muslims and non-Muslims live side by side and have to learn about one another, share commonalities and respect differences. At this time more than one and a half billion Muslims live in this village. Some of them are pious Muslims, trying to live in accordance with Islamic rules, whereas others do not while believing that these rules come from God (*the Qur'an*), from interpretations of His Messenger (*the Sunnah*) or the consensus of Muslim jurists (*ijmā*), and are at least rules derived via analogy (*qiyās*) from the main sources of Islam. Most Muslims think along these lines and agree with the above. The reader should remember that Muslim individuals should live according to Islamic rules in private, but no individual is responsible for implementing Islamic law. In any event, the need to learn the facts about Islamic law is necessary for Muslims as well as for non-Muslims if they live in the same society with Muslims, at least in the sense of general information.

This book is divided into eight chapters.

Chapter I. Because of the many misunderstandings that arise, some terms related to Islamic Law, such as *Shari'ah*, *fiqh*, *qānūn*, *urf*, Islamic Law, and Muhammadan Law are explained.

Chapter II. Here, in this chapter dedicated to references on Islamic Law, the real added value of this book is found.

Chapter III. This chapter looks at four periods of Islamic Law: the period of the Prophet Muhammad, the period of the Companions, the period of the Tabi'in, and an introduction to the period of *Mujtahidin*.

Chapter IV. We will provide detailed information here on the different law schools and theological divisions.

Chapter V. This chapter will be devoted to a period of Islamic law that has been neglected in both old and new books and articles, i.e. the period of Islamic Law after the Turks converted to Islam (960-1926).

Chapter VI. This chapter will focus also on three main subjects: Anglo-Muhammadan law (Indo-Muslim law), Syariah or Islamic Law in Southeast Asia, and Islamic Law in contemporary Muslim states like Egypt, Pakistan, Morocco, Indonesia and Jordan.

Chapter VII. We will explain the system and methodology of Islamic Law in this chapter.

Chapter VIII. We will give some brief information here on the implementation of Islamic Law, its future; some encyclopedical works on Islamic law, and new institutions of Islamic *fiqh*."

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FOREWORD

The world today has become one large village. Muslims and non-Muslims live side by side and have to learn about one another, share commonalities and respect differences. At this time more than one and a half billion Muslims live in this village. Some of them are pious Muslims, trying to live in accordance with Islamic rules, whereas others do not while believing that these rules come from God (the *Qur'an*), from interpretations of His Messenger (the *Sunnah*) or the consensus of Muslim jurists (*ijmā'*), and are at least rules derived via analogy (*qiyās*) from the main sources of Islam. Most Muslims think along these lines and agree with the above. The reader should remember that Muslim individuals should live according to Islamic rules in private, but no individual is responsible for implementing Islamic law.

Despite the above view of Islamic rules, many tendencies with respect to Islamic law can be found among Muslim scholars and non-Muslim scholars. Some of them try to interpret sacred texts according to hermeneutical¹ rules that are used mostly in

¹ We could define hermeneutics as the study of the general principles of interpretation. Traditional hermeneutics – which includes Biblical hermeneutics – refers to the study of the interpretation of written texts, especially texts in the areas of literature, religion and law. Contemporary or modern hermeneutics encompasses not only issues involving the written text but everything in the interpretative process.

As is well known, Muslim jurists use the terms *tafsīr* or *ta'wīl* for interpretation, not hermeneutics. We should not confuse Islamic legal terms and European terms. We will explain the rules for interpretation in Islamic law in the second book.

Some scholars argue that law and theology constitute particular forms of hermeneutics because of their need to interpret legal tradition/scriptural texts. Moreover, the problem of interpretation has been central to legal theory, at least since the 11th century C.E. in Christianity. In the Middle Ages and the Renaissance, the schools of glossators, commentators and *usus modernus* were distinguished in line with their approach to the interpretation of “laws” (mainly Justinian's *Corpus Iuris Civilis*).

The University of Bologna gave birth to a “legal renaissance” in the 11th century C.E., when the *Corpus Iuris Civilis* was rediscovered and started to be systematically studied by people like Irnerius and Gratianus. It was an interpretative Renaissance. Since then, interpretation has always been at the center of legal thought. Among others, Savigny and Betti, also made significant contributions to general hermeneutics. Legal interpretivism, the most famous version of which was developed by Ronald Dworkin, can be seen as a branch of philosophical hermeneutics (cf. Gayle L. Ormiston and Alan D. Schrift, *The Hermeneutic Tradition: From Aristotle to Ricoeur* (Albany: NYU Press, 1990), pp. 39-115; Paul Ricoeur, *Interpretation Theory: Discourse and the Surplus of Meaning* (Fort Worth: Texas Christian University Press, 1976).

Muslim scholars have discussed this problem in *usûl al-fiqh* under the title of *tafsīr* and *ta'wīl*. But Islamic modernism is an attempt to find new interpretations of the law or to construct a new hermeneutics that facilitates interpretations consistent with the demands of modern society. Mem-

Christian theology, and they forget the Islamic rules and principles for interpretation, which are called *usûl al-fiqh*. Some of them compare Islamic law and rules to Christianity, call for reforms regarding claims of historicity and confuse Islamic legal terms and European terms.² Some say that Islamic law is outdated and that Muslim society should have secular law. Others are trying to create a new Islam in the name of European Islam or Moderate Islam and describe *Shari'ah*, i.e. Islamic law, as, in fact, barbarian.

European universities have taught Islamic law in an orientalist way to non-

bers of this school are said to "go to excess" in their hermeneutics of the texts, whether theological or legal, or outright traditions. Everything that does not agree with their view is given a new "spin" in the name of interpretation (Habib Rahman Md. Ibramsa, "Muslim Modernists and New Hermeneutic Approach to the Prophetic Tradition: Special Reference to the Injunction of Sariqah and Hirabah," paper presented at the 34th Annual AMSS Conference, "Muslims and Islam in the Chaotic Modern World: Relations of Muslims among Themselves and with Others." Temple University, Philadelphia, September 30 - October 2, 2005, http://www.temple.edu/tempress/contents/v34/v34_34_1.htm (accessed 11.07.2009).

² Historicity refers to how history is, to allow discussion as to how its form is interpreted (linear, circular, repetitive etc). The historicity of the Bible addresses the question of the historical accuracy of the Bible, the extent to which it can be used as a historical source and what qualifications should be applied from the academic viewpoint.

Historicism is a school of interpretation that, in its theological usage, treats the eschatological prophecies of Daniel and Revelation as finding literal fulfillment on earth through the history of the church and especially in relation to the struggle between the true church and apostasy. Historicism is contrasted to Preterism, Futurism and Idealism. Emerging within the early church, Historicism became a dominant eschatological interpretation in the Protestant-Catholic conflicts of the Reformation. A Historicist approach was taken by Martin Luther, although claims that John Calvin held to the Historicist interpretation are not universally recognized. Among conservative Protestants, historicism was supplanted in the 19th century C.E. by Futurism, with the rise of dispensationalist theology. Historicism continues to be taught in churches originating in the Adventist movement (Leroy Edwin Froom, *The Prophetic Faith Of Our Fathers*, vol. II (1948), pp. 267-79, 436).

With respect to the historicity of Islam, the earliest source of information for the life of Muhammad is the Qur'an, even though it does not provide a great deal of such information. Next in importance are the historical works by the writers of the third and fourth century of the Muslim era. According to this theory, Muhammad is "the only founder of a major world religion who lived in the full light of history and about whom there are numerous records in historical texts, although like other pre-modern historical figures not every detail of his life is known." The supporters of this theory attempt to distinguish between the historical elements and the non-historical elements of many of Muhammad's sayings. A major source of difficulty in the quest for the historical Muhammad is the modern lack of knowledge about pre-Islamic Arabia. (Abdualziz Sachedina, "The Ideal and Real in Islamic Law," in: Ravindra S. Khare, *Perspectives on Islamic Law, Justice, and Society* (Lanham: Rowman & Littlefield, Publishers, 1999), pp. 15-31; F.E., Peters "The Quest for Historical Muhammad," *International Journal of Middle East Studies*, 23 (1991): 291-315; Cf. Kai Hafez and Mary Ann Kenny, *The Islamic World and The West: An Introduction to Political Cultures and International Relations* (Leiden: Brill 2000), pp. 52-4.

Muslim students. The works by Joseph Schacht, Ignaz Goldziher and A. W. T. Juynboll, etc. are well known. There are many Muslim critics of their work, but two important changes have now occurred. *First*, most students in Islamic Studies in Western countries are Muslims. They are sometimes more aware of the original sources of Islamic law than their teachers are. *Second*, non-Muslim scholars have changed and have become more objective. For example, they call themselves Islamologists rather than orientalists and talk about Islamic law instead of Muhammadan law. There are many new serious works by non-Muslims on Islamic law.

In any event, the need to learn the facts about Islamic law is necessary for Muslims as well as for non-Muslims if they live in the same society with Muslims, at least in the sense of general information. For this reason, as a professor in Islamic law at the Islamic University of Rotterdam, I have concluded that a manual on Islamic law is urgently needed for university students as well as for all those who need to learn some general information about Islamic law. I have benefited from original sources in Arabic or Ottoman manuscripts, but I have benefitted from English books written by Muslim or non-Muslim scholars. For example, *Islamic Theories of Finance: With an Introduction to Islamic Law and a Bibliography* by the non-Muslim Ottoman scholar Nicolas Aghnides, *Principles of Islamic Jurisprudence* by Mohammad Hashim Kamali, and works by Waeel Hallaq, Rudolph Peters and others have helped me.

I propose arranging this work in 4 books:

Book 1: Introduction to Islamic Law. This book is a concise history of developments in Islamic law. I believe I have many new things to say about this subject, especially about references to Islamic law and developments in Islamic law after the Turks embraced Islam. I hope students and my colleagues will appreciate that. Here, I will discuss the methodology and the implementation of Islamic law in Muslim countries.

Book 2: The Principles of Islamic Jurisprudence. This book will discuss new tendencies in the interpretation of Islamic sacred texts, such as historicity and the hermeneutical method suggested by some Muslim scholars like Fazlur Rahman,³ Hassan

³ Fazlur Rahman Mâlik (1919–1988) is a well-known Muslim scholar. He was born in the Hazara area of British India (now Pakistan). His father, Maulana Shihab al-Din, was a well-known scholar of the time who had studied at Deoband and had achieved the rank of *alim* through his studies of Islamic law (*fiqh*, *hadîth*, Qur'anic *Tafsîr*, logic, philosophy and other subjects). Rahman studied Arabic at Punjab University and went on to Oxford University where he wrote a dissertation on ibn Sina. He then began teaching, first at Durham University where he taught Persian and Islamic philosophy, and then at McGill University where he taught Islamic Studies until 1961. He moved to the University of Chicago in 1969. There he was instrumental in building a strong Near Eastern Studies program that continues to be among the best in the world. Rahman also became a proponent for reform of Islamic policy and was an advisor to the State Department. He died in 1988. Since Rahman's death his writings have continued to be popular among Islamic and Near Eastern scholars. His famous works are *Islam* (Chicago: University of Chicago Press, 1979 (2nd ed.); *Islam and Mod-*

Hanafi⁴ and Muhammad Arkoun,⁵ and summarize all the rules relating to principles of Islamic jurisprudence as explained by Muslim scholars in the books of *usûl al-fiqh*.

Book 3: Islamic Public Law. Here I will discuss Islamic constitutional law, administrative law, financial law, penal law, trial law with judges and international law. I will focus on the implementation of *Shari'ah* and the power of legislation in Islamic law.

Book 4: Islamic Private Law. In this book I will explain Islamic rules relating to personal law, family law, heritage law, contract law, goods law, law of citizenship. I will discuss different variants of application in different Muslim countries.

Muslims believe that different prophets may come in one age, and that they have come. Since the coming of the Seal of the Prophets⁶, the *Shari'ah* of Muhammad is sufficient for all peoples in every age: there is no longer any need for different laws. However, in secondary matters, the need for different schools has persisted to a degree. Just as clothes change with the seasons and medicines change according to dispositions, so sacred laws change with the ages, and their ordinances change according to the capacities of peoples. Because the secondary matters of the ordinances of *Shari'ah* are similar to human circumstances, they, like medicine, are implemented in line with those circumstances.

We do not agree with the view that the *Sunnah* and the theory of the sources of Islamic law did not really develop until the 9th century and that Islamic law did not really derive from the Qur'an and the *Sunnah*. Our explanations on this subject can be found in this book and the next.

We believe that because of the doctrine "*A perspicuous Arabic Qur'an*"⁷ the meaning of the Qur'an is clear. From beginning to end, the Divine address revolves around authoritative meanings, corroborating them and making them self-evident.

ernity: Transformation of an Intellectual Tradition (Chicago: University of Chicago Press, 1982); *Major Themes of the Qur'an* (Chicago: University of Chicago Press, 2009); *Revival and Reform in Islam*, ed. Ebrahim Moosa (Oxford: Oneworld Publications, 1999).

⁴ Hassan Hanafi is a professor of philosophy and a leading authority on modern Islam. He studied at the Sorbonne in Paris, and since 1967 he has been a professor of philosophy in Cairo, as well as a visiting professor at universities in France, the United States, Belgium, Kuwait and Germany. His most famous book in English is *Cultures and Civilizations: Conflict or Dialogue; Islam in the Modern World*.

⁵ Arkoun is a French-Algerian scholar and has written many books, e.g., *Islam: To Reform or to Subvert?* See Tamara Sonn, *Interpreting Islam* (Oxford: Oxford University Press, 1996), especially pp. 189-90; *The Unthought in Contemporary Islamic Thought* (London: Saqi Books, 2002).

⁶ The prophecy of Muhammed has raised a number of remarks among Christians; because they believe that Jesus Christ is greater than all prophets and revelation comes from one who is greater than all prophets. Cf. Conference of European Churches, *Witness to God in a Secular Europe*, (Geneva: 1985), p. 40.

⁷ The Qur'an, *Fussilat*, 40:3.

Not to accept those authoritative meanings suggests the denial of the Almighty God and an insult to the Prophet's understanding. That is to say, those authoritative meanings have been taken successively from the source of Prophethood.

We should keep in mind here that only sovereign Muslim states/governments have the legal authority to implement Islamic law. An individual Muslim has no legal authority or power to implement Islamic law. The law of Islam certainly does not say that every Muslim is obliged to implement Islamic law. It matters not how efficient and popular that individual may be as a brave warrior or a meticulous planner of unlawful and immoral schemes of hatred, terror and destruction. Only people who are properly qualified and trained, and hold a license from Muslim governmental authorities, have the authority to issue *fatwās*. Not every Muslim individual qualifies as a *Muftī* (a jurist-consult or scholar of law who has been given a license to issue *fatwās*). For this reason Bediuzzaman says: "*And we know that the fundamental aims of the Qur'an and its essential elements are fourfold: divine unity (al-tawhīd), prophethood (al-nubuwwah), the resurrection of the dead (al-hashr), and justice (al-'adalah)*".⁸ *Al-Adalah* means law. He adds in another treatise: "*Let our ulul-amr (satesmen and political authorities) think over implementing these rules*".⁹

We as Muslim scholars are not comfortable about the generalizations used by most critics of Islamic law. Most critics speak and write about Islamic law and Muslims as if there were no serious theological and ethnic differences to be found within this religion or its adherents, as is the case in most world religions. Knowledge about the history and phenomenology of Islam as a world religion is sparse in Europe, if not simply absent. Islam is often covertly or sometimes even overtly identified with an anti-democratic theocracy and with terrorism. This is not true. But there is a second matter about which we feel uncomfortable too, i.e. the present debates on Islamic law and Muslims. Those mainly involved in this debate are non-Muslims, often motivated by an anti-religious and often rather fanatically atheistic spirit. The main reason for this is the simple fact that Europeans do not yet have enough of an "Islamic elite", i.e. a group of well-educated and well-integrated intellectuals who are able to demon-

⁸ Bediuzzaman Said Nursi, *Signs of Miraculousness, The Inimitability of the Qur'an's Conciseness*, (Istanbul: Sozler Publications, 2007), Introduction, p. 18.

⁹ Abu al-Hasan Ali ibn Muhammad al-Mawardi, *al-Ahkām al-Sultaniyyah fī al-Wilāyat al-Diniyyah*, (Kuwait: Dar ibn Qutaybah, 1989), pp. 22-23; Zafir al-Qasimi, *Nizām al-Hukm fī al-Sharī'ah wa al-Tārīkh al-Islāmī*, (Beirut: Dar al-Nafa'is, 1990), pp. 352-53; Berger, Maurits, "Shari'ah Law in Canada- Also Possible in the Netherlands?" in Paulien van der Grinten, Ton Heukels, F. J. A. van der Velde, *Crossing Borders: Essays in European and Private International Law, Natioanlity Law and Islamic Law*, (Amsterdam: Kluwer Rechtswetenschapelijk Publicaties, 2006), pp. 173-83; See some discussions in the Netherlands: Maurits Berger, "Sharia in Europa? Welke Sharia," *Eutopia*, October 2005, nr. 11; <http://www.wijblijvenhier.nl/index.php?/archives/711-Donner-Minister-van-Shari'ah.html> (accessed 5. 9. 2009).

strate that an Islamic faith and an Islamic lifestyle are possible and viable within a modern, Western, and democratic context.¹⁰

We prefer to write what Muslim jurists (*fuqahâ*) have explained as the interpretation of the Qur'an and the *Sunnah*. Our success will be measured by our ability to reflect what existed in Islamic sources correctly. Everything human beings start falls short; we are ready to perfect our study with the help of contributions by readers and constructive criticism. I would like to thank all those who read this book and contribute constructively to it. I am thankful to God Who enabled me to complete this book of my work.

23. 12. 2009 Rotterdam

Ahmed Akgunduz

¹⁰ Cf. Prof. Dr. Anthon Zijderveld, *The Speech in Opening Academic Year of 2005-2006 at the IUR*, (Rotterdam, 2005).

OUTLINE OF THE BOOK

Students of Islamic studies, scholars and researchers may wonder why a new book on Islamic law and its history is needed – there are already many books in English and Arabic. Therefore, I would like to explain our methodology and the new features of this first book of the series Islamic Law in Theory and Practice.

This book is divided into eight chapters.

Chapter I. Because of the many misunderstandings that arise, some terms related to Islamic Law, such as *Sharī'ah*, *fiqh*, *qānūn*, *urf*, Islamic Law, and Muhammadan Law are explained. We will give clear definitions, using primary sources and indicate the interrelated meanings they have. The main characteristics of Islamic Law and the mutual influences between Islamic Law and other legal systems will be discussed.

Chapter II. Here, in this chapter dedicated to references on Islamic Law, the real added value of this book is found. As scholars know, there are many valuable old sources (like Kâtib Chelebi Haji Khalifah's *Kashf al-Zunûn 'an Asâmî al-Kutub wa'l-Funûn* and Mustafa Tashkopruzadeh's *Miftâh al-Sa'âdah we Misbâh al-Siyâdah*) and new ones (like Nicolas Aghnides's dissertation *Islamic Theories of Finance: With an Introduction to Islamic Law and a Bibliography*, J. Schacht's book *An Introduction to Islamic Law*, and Laila al-Zwaini/Rudolph Peters's work *A Bibliography of Islamic Law 1980-1993*) on this subject. But there are some things missing in these works. Researchers and students need comprehensive and concise references on Islamic Law. These references will be classified under several categories: theoretical and applied references (*shar'îyyah* records, *fatâwâ*, archival documents, legal arrangements, and legal codes (*qawânîn*)). Applied sources have largely been lacking in the works listed. No legal system can be understood precisely without reference to applied sources. Here the theoretical sources will be classified systematically. This chapter will serve as a useful manual for all students and researchers.

Chapter III. This chapter looks at four periods of Islamic Law: the period of the Prophet Muhammad, the period of the Companions, the period of the *Tabi'în*, and an introduction to the period of *Mujtahidîn*. We will explain the main sources, features and provide examples of legislative activities in these periods.

Chapter IV. We will provide detailed information here on the different law schools and theological divisions. A crucial point on this subject will be corrected, and we will draw attention to the importance of not confusing the two kinds of schools: schools of thought (*i'tiqâd*) and schools of law (*fiqh*). Most Muslims – and some scholars as well – display confusion on this subject. Therefore, all schools in Islam will be divided into two groups. First are *schools of thought* (*al-madhâhib al-i'tiqâdiyyah*), a category that includes 1) *Ahl al-sunnah wal-jamâ'ah* schools, which have been described by Sunnî scholars as *al-Madhab al-Haq* (Righteous School) and 2) *Ahl al-*

Bid'ah schools, which are described as heretical or *al-Madhhab al-Bâtil* by Sunnî Muslim scholars. It is possible to describe these schools of thought as Sunnî or Shi'î; but schools of law cannot be described as either Sunnî or Shi'î. Second are *schools of law* (*al-madhâhib al-'amaliyyah-fiqhiyyah*). We want to remind our readers that nobody can describe any law school as Sunnî or Shi'î, *bâtil* or *haqq* or otherwise because the question of *fiqh* is not a matter of faith. A Muslim, such as Zamakhshari, the author of *al-Kashshâf*, may be Mu'tazilî in faith but Hanafî in *fiqh*. There are exceptions only with respect to the Shi'a and some *Fiqh Schools*. Shi'a is a school of thought, whereas Ja'fariyyah and Zaidiyyah are *Fiqh Schools*. But everybody who was affiliated with the Shi'a was also affiliated with either the Ja'fariyyah or Zaidiyyah schools. Wrong descriptions of schools can often be found in books, articles and on websites.

Chapter V. This chapter will be devoted to a period of Islamic law that has been neglected in both old and new books and articles, i.e. the period of Islamic Law after the Turks converted to Islam (960-1926). We will explain legal activities and draw attention to the improvement of Islamic Law before and after the Ottoman State and focus on legal codes and the codification of Islamic law in this period. We think that this chapter also adds value to the history of Islamic Law.

Chapter VI. Here we will indicate some classifications for Islamic rules; because especially at present there are many confusing views on Islamic Law. Without information on these classifications nobody can discuss hermeneutics and historicity correctly. This chapter will focus also on three main subjects: Anglo-Muhammadian law (Indo-Muslim law), Syariah or Islamic Law in Southeast Asia, and Islamic Law in contemporary Muslim states like Egypt, Pakistan, Morocco, Indonesia and Jordan.

Chapter VII. We will explain the system and methodology of Islamic Law in this chapter. Islamic Law is an original legal system, having a particular system of arrangement and classification. All books on Islamic jurisprudence followed a system that was more important and practical for ancient jurists, instead of the distinction between public and private law based on Roman law. We argue that Islamic Law is mixed, having some features of the casuistic method: Islamic Law does invoke case law (*mas'alah*) to some extent. But Islamic Law also has some features of the abstract method because it has general legal principles that should be implemented. Based on theological and rational arguments, the juridical authority of what *mujtahids* called holistic evidence (*al-dalîl al-kullî*) is considered one of the fundamentals (*usûl*) to which *mujtahids* had given priority over single and partial rulings.

Chapter VIII. We will give some brief information here on the implementation of Islamic Law, its future; some encyclopedical works on Islamic law, and new institutions of Islamic *fiqh*.

CONTENTS

FOREWORD	3
OUTLINE OF THE BOOK	9
CONTENTS	11
1 SHARÎ'AH, FIQH AND ISLAMIC LAW	19
1.1 DEFINITIONS.....	19
1.1.1 Sharî'ah (Shar' or Shar'-i Sharîf).....	19
1.1.2 Fiqh (Islamic Law).....	20
1.1.3 Qânun and 'Urf	22
1.1.4 Muhammadan Law	23
1.2 THE MAIN CHARACTERISTICS OF ISLAMIC LAW	25
1.3 THE RELATION BETWEEN ISLAMIC LAW AND OTHER LEGAL SYSTEMS	27
1.3.1 The Influence of Islamic Law on Other Legal Systems.....	27
1.3.2 Relation to other Legal Systems.....	32
2 THE SOURCES OF INFORMATION FOR ISLAMIC LAW (REFERENCES)	39
2.1 THEORETICAL REFERENCES	39
2.1.1 Books of Fiqh (Applied Islamic Law).....	39
2.1.1.1 Mudallal (Supported with Arguments) Books of Islamic Law	40
2.1.1.1.1 Hanafîte Books with Arguments on the Application of Fiqh	40
2.1.1.1.2 Shâfi'î Books with Arguments on the Application of Fiqh	42
2.1.1.1.3 Mâlikî Books with Arguments on the Application of Fiqh	44
2.1.1.1.4 Hanbalî Books with Arguments on the Application of Fiqh	45
2.1.1.1.5 Shi'î Books with Arguments on the Application of Fiqh	46
2.1.1.1.6 Zâhirî Books with Arguments on the Application of Fiqh	46
2.1.1.2 Ghair al-Mudallal (Not Supported with Arguments) Books of Islamic Law	47
2.1.1.2.1 Hanafî Books without Arguments about the Application of Fiqh.....	48
2.1.1.2.2 Shâfi'î Books without Arguments on the Application of Fiqh	51
2.1.1.2.3 Mâlikî Books without Arguments on the Application of Fiqh	52
2.1.1.2.4 Hanbalî Books without Arguments on the Application of Fiqh	54
2.1.1.2.5 Shi'î Books without Arguments on the Application of Fiqh	55
2.1.2 Books of Usûl al-Fiqh (Principles of Islamic Jurisprudence)	55
2.1.2.1 Books on Usûl al-Fiqh according to the Hanafî (Manhaj al-Fuqahâ) Method.....	56
2.1.2.2 Books of Usûl al-Fiqh according to the Method of Theologians (Manhaj al-Mutakallimîn)	57

2.1.2.3	Books on <i>Usûl al-Fiqh</i> that Combine Both Methods	59
2.1.3	<i>Books on Hadîths (Traditions of Prophet Muhammad)</i>	60
2.1.3.1	Some Books of Tradition (<i>Hadîth</i>)	61
2.1.3.2	The Books of <i>Hadîth</i> on Legal Rules (<i>Kutub al-Ahkâm</i>)	62
2.1.3.3	Some Books on the Science of Tradition (<i>Usûl al-Hadîth</i>)	63
2.1.3.4	Shî'a <i>Hadîth</i> Books	64
2.1.4	<i>Books of Tafsîr (Interpretation of the Holy Qur'an)</i>	64
2.1.4.1	Some Commentaries on the Qur'an	64
2.1.4.2	The Books on <i>Ahkâm al-Qur'an</i> (Qur'anic Fiqh)	65
2.1.4.2.1	Hanafî Works on Fiqh al-Qur'an	65
2.1.4.2.2	Mâlikî Works on Fiqh al-Qur'an	66
2.1.4.2.3	Shâfi'î Works on Fiqh al-Qur'an	67
2.1.4.2.4	Hanbalî Works on Fiqh al-Qur'an	67
2.1.4.2.5	Shi'î Works on Fiqh al-Qur'an	67
2.1.4.2.6	Zaidî Works on Fiqh al-Qur'an	68
2.1.4.2.7	Zâhirî Works on Fiqh al-Qur'an	68
2.1.4.3	The Books on the Science of Qur'an Interpretation (<i>'Ulûm al-Qur'an</i>)	68
2.1.5	<i>Monographic Works (Treatises=Rasâ'il)</i>	69
2.1.6	<i>Lexicological Sources (al-Ma'âjim)</i>	70
2.1.7	<i>Biographical Sources (Books of Tabaqât)</i>	72
2.1.7.1	Companions and Followers	72
2.1.7.2	General <i>Tabaqât</i>	72
2.1.7.3	Hanafîte <i>Tabaqât</i>	73
2.1.7.4	Shâfi'îte <i>Tabaqât</i>	74
2.1.7.5	Mâlikîte <i>Tabaqât</i>	74
2.1.7.6	Hanbalîte <i>Tabaqât</i>	74
2.1.7.7	Shi'îte <i>Tabaqât</i>	75
2.1.8	<i>Bibliographical Sources</i>	75
2.1.9	<i>History Books (Especially Histories of Institutions)</i>	75
2.1.10	<i>Books on Differences among Islamic Law Schools (Ihktilâf al-Madhâhib)</i> ...	76
2.1.11	<i>Books on Religious and Philosophical Sects</i>	78
2.1.12	<i>Books and Works by Non-Muslim Scholars</i>	78
2.1.12.1	General Books and Works by Non-Muslim Scholars	78
2.1.12.2	Books and Works by Non-Muslim Scholars on the Hanafî school	81
2.1.12.3	Books and Works by Non-Muslim Scholars on the <i>Shâfi'î</i> School	82
2.1.12.4	Books and Works by Non-Muslim Scholars on the <i>Mâlikî</i> School	82

2.1.13	<i>Some Books by Muslim Scholars in Western Languages</i>	83
2.1.14	<i>Books on Legal Maxims of Islamic Law (Qawā'id al-Kulliyah al-Fiqhiyyah)</i> ..	84
2.1.15	<i>Comparative and Contemporary Books by Muslim Scholars</i>	85
2.1.15.1	Comparative and Contemporary Books on <i>Fiqh</i>	85
2.1.15.2	Comparative and Contemporary Books on <i>Usûl al-Fiqh</i>	88
2.1.15.3	Books on Muslim Minorities (<i>Fiqh al-Aqalliyât</i>).....	88
2.1.15.4	Comparative and Contemporary Books on <i>Shî'a</i>	89
2.1.15.5	Miscellaneous English Sources in Islamic Law	89
2.2	APPLIED REFERENCES	94
2.2.1	<i>Shar'îyyah Records</i>	95
2.2.2	<i>Books of Fatâwâ (Religious Opinions and Answers)</i>	97
2.2.2.1	Fatwâ Collections of Hanafî School.....	98
2.2.2.2	Fatwâ Collections of the Shâfi'î School.....	101
2.2.2.3	Fatwâ Collections of the Mâlikî School	102
2.2.3	<i>Archival Documents</i>	102
2.2.4	<i>Legal Arrangements and Judicial Decrees (Qawânîn)</i>	104
3	THE HISTORICAL PERIODS OF ISLAMIC LAW	109
3.1	THE PERIOD OF THE PROPHET MUHAMMAD.....	109
3.1.1	<i>Legislation during the Period of Muhammad and Sources of Law</i>	109
3.1.2	<i>The Main Features of Legislative Activities</i>	114
3.1.3	<i>The Prophet's Ijtihâd and Interpretation</i>	116
3.2	THE PERIOD OF THE COMPANIONS (THE PERIOD OF THE RIGHTLY GUIDED CALIPHS=AL-KHULAFÂ AL-RÂSHIDÛN, 11-40/632-660)	120
3.2.1	<i>The Sources of Legislative Activities</i>	121
3.2.2	<i>Some Issues Relating to the Period of the Companions</i>	124
3.2.3	<i>Some Examples from the Opinions of the Companions</i>	130
3.2.3.1	Some Examples of Consensus among the <i>Sahâbah</i>	131
3.2.3.2	Some Examples from the Conflicts among the Companions	132
3.3	THE PERIOD OF THE <i>TÂBI'ÎN</i> (FOLLOWERS=SUCCESSORS OF THE COMPANIONS, 41-120/660-738) ..	133
3.3.1	<i>The Features of Legislative Activities</i>	134
3.3.2	<i>The Hijaz School of Fiqh and the Baghdad (Kufic) School of Fiqh</i>	137
3.3.3	<i>The School of Ahl al-Athar and the School of Ahl al-Ra'y</i>	139
3.3.3.1	The School of the People of <i>Hadîth</i>	139
3.3.3.2	The School of the People of Opinion (<i>Ahl al-Ra'y</i>)	141

3.4 THE PERIOD OF <i>MUJTAHIDĪN</i> (120-350/738-960).....	143
4 LAW ('AMALĪ) SCHOOLS AND THEOLOGICAL SCHOOLS (I' TIQÂDĪ) IN ISLAM (MADHHABS)	147
4.1 GENERAL CONSIDERATIONS	147
4.2 THE <i>FIQH</i> SCHOOLS (MADHHABS) AND THEIR FOUNDERS.....	149
4.2.1 The Hanafî School and Its Founder: Imâm A'zam	151
4.2.2 The Mâlikî School and Its Founder: Imâm Mâlik	156
4.2.3 The Shâfi'î School and Its Founder: Imâm Shafi'î.....	159
4.2.4 The Hanbalî School and Its Founder: Imâm Ahmad ibn Hanbal.....	163
4.2.5 The Zâhirî School and Its Founder: Imâm Dawud ibn 'Ali al-Zâhirî.....	166
4.2.6 The Ja'farî School and Its Founder: Imâm Ja'far al-Sâdiq.....	169
4.2.7 The Zaidiyyah School and Its Founder: Imâm Zaid ibn 'Ali.....	172
4.2.8 The Ibâdhî School	174
4.2.9 Extinct Schools of Law	176
4.2.9.1 Al-Awza'î School	176
4.2.9.2 Al-Thawrî School	177
4.2.9.3 The al-Laith ibn Sa'd School.....	177
4.2.9.4 The Ibn Jarîr al-Tabarî School.....	179
4.2.9.5 Sufian ibn 'Uyainah School.....	179
4.3 SOME THEOLOGICAL SCHOOLS AND THEIR OPINIONS ON <i>FIQH</i>	180
4.3.1 Some Considerations.....	180
4.3.1.1 What is Difference between Islam and Îmân?	181
4.3.1.2 Who is a Muslim?	182
4.3.2 Some Ahl al-Bid'ah Theological Schools.....	184
4.3.2.1 Mu'tazila=Qadariyyah (Opponents of Qadar)	184
4.3.2.2 Khârijîtes	187
4.3.2.3 The Shi'a	189
4.3.2.4 Jabriyyah= Jahmiyyah (Proponents of Predetermination).....	193
4.3.2.5 The Bâtiniyyah and Qarmathians.....	194
4.3.2.6 The Mushabbihah and Mujassimah (al-Karrâmiyyah).....	196
4.3.2.7 Murji'ah	197
4.3.2.8 The al-Najjâriyyah.....	198
4.3.3 Wahhâbism and Salafism.....	198
4.3.4 Ahmadiyyah (Qâdhiyaniyyah and Lahoriyyah)	202
4.3.5 Ismâ'iliyyah and Aga Khan.....	205

4.3.6	<i>Ibâdhiyyah</i>	207
4.3.7	<i>Sunnî Theological Schools and Their Views on Fiqh</i>	208
4.3.7.1	Salaf al-Sâlihîn	208
4.3.7.2	The Ash'arî School (Ash'arîtes).....	210
4.3.7.2.1	The Main Doctrines of al-Ash'arî.....	211
4.3.7.2.2	The Problem of Reason and Revelation and the Criterion of Good and Evil ..	213
4.3.7.3	Mâturidî Theology	216
4.3.7.3.1	General Information.....	216
4.3.7.3.2	Reason, Knowledge and Law	218
5	THE PERIOD OF ISLAMIC LAW AFTER THE TURKS PROFESSED ISLAM (960-1923) ...	221
5.1	THE AGE OF QARAKHANIDS (FROM 329/940 ONWARD) AND THE CODIFICATION OF THEORETICAL AND APPLIED ISLAMIC LAW	221
5.2	LEGAL DEVELOPMENTS IN OTHER TURKISH STATES BEFORE THE OTTOMANS (THE AGE OF IMITATION = 'ASR AL-TAQLÎD)	223
5.2.1	<i>Developments in the Seljuqid Period</i>	223
5.2.2	<i>Developments after the Mongol Invasion (656/1258)</i>	226
5.2.2.1	Characteristics of the Age and Activities Conducted	226
5.2.2.1.1	Texts (al-Mutûn).....	227
5.2.2.1.2	Annotations and Exegeses (Shurûh).....	228
5.2.2.1.3	Footnotes (Havâshî)	229
5.2.2.1.4	Books of Fatâwâ	229
5.2.2.2	Contributions of Chagatai Khans and the Babur State to the History of Islamic Law ..	230
5.2.3	<i>Legal Developments in Dhulqâdirids, Aqqoyunids and Other Muslim Turkish States</i>	231
5.2.3.1	The Codification (<i>Qânûnnâme</i>) of Ala'uddawlah Beg.....	232
5.2.3.2	Legal Codes of Padishah Hasan (<i>Qânûnnâme-i Hasan Pasha</i>)	233
5.2.4	<i>Legal Developments in Ottoman State (1299-1926)</i>	235
5.2.4.1	Legal Developments until the <i>Tanzîmât</i> Reforms (699-1255/1299-1839).....	235
5.2.4.1.1	General Information.....	235
5.2.4.1.2	The Branches of Law Arranged by the Legal Codes (Qanunnâmes)	238
5.2.4.1.3	The Ottoman Legal System According to Sharî'ah Court Records.....	240
5.2.4.1.4	Ottoman Law as a Whole	242
5.2.4.2	Legal Developments in the Post- <i>Tanzîmât</i> Period (1255 -1345/1839-1926)	243
5.2.4.3	The Ottoman Civil Law: Majalla	246
6	THE MODERN PERIOD AND ISLAMIC LAW	251

6.1	SOME DISCUSSIONS ON THE CONTEMPORARY PRACTICE OF <i>SHARĪ'AH</i> LAW	251
6.2	THE CLASSIFICATION OF <i>SHARĪ'AH</i> INJUNCTIONS AND THE REFORM OR RENOVATION OF <i>SHARĪ'AH</i> LAW	256
6.2.1	<i>Classification of Shari'ah Injunctions According to Legal Authority</i>	256
6.2.2	<i>Classification of Shari'ah Injunctions from the Aspect of Their Nature</i>	258
6.2.3	<i>Comprehensive (Mujmal) and Detailed (Mufassal) Injunctions</i>	258
6.2.4	<i>Comprehensible and Incomprehensible Injunctions</i>	259
6.2.5	<i>Possible Conclusion</i>	261
6.3	ANGLO-MUHAMMADAN LAW (INDO-MUSLIM LAW)	264
6.3.1	<i>Islamic Law in India</i>	268
6.3.2	<i>Islamic Law in Pakistan</i>	270
6.3.3	<i>Islamic Law in Bangladesh</i>	274
6.4	ISLAMIC LAW IN SOUTHEAST ASIA: SYARIAH OR ANGLO-MUHAMMADAN LAW	276
6.4.1	<i>Islamic Law in Indonesia</i>	280
6.4.2	<i>Islamic Law in Malaysia</i>	284
6.5	ISLAMIC LAW IN SAUDI ARABIA	289
6.6	ISLAMIC LAW IN IRAN	292
6.7	ISLAMIC LAW IN EGYPT	293
6.8	ISLAMIC LAW IN LIBYA	296
6.9	ISLAMIC LAW IN MOROCCO	297
6.10	ISLAMIC LAW IN NIGERIA	299
6.11	ISLAMIC LAW IN LEBANON	300
6.12	ISLAMIC LAW IN SYRIA	303
6.13	ISLAMIC LAW IN IRAQ	304
6.14	ISLAMIC LAW IN JORDAN	305
6.15	ISLAMIC LAW IN KUWAIT	306
6.16	ISLAMIC LAW IN SUDAN	307
6.17	ISLAMIC LAW IN SOMALIA	309
6.18	ISLAMIC LAW IN KENYA	310
6.19	ISLAMIC LAW IN ETHIOPIA	312
6.20	ISLAMIC LAW IN ALGERIA	313
6.21	ISLAMIC LAW IN TUNISIA	315
6.22	ISLAMIC LAW IN UNITED ARAB EMIRATES	315
6.23	ISLAMIC LAW IN YEMEN	316

Foreword and Contents	17
6.24 ISLAMIC LAW IN TURKEY	317
7 THE SYSTEM AND METHODOLOGY OF ISLAMIC LAW	319
7.1 THE SYSTEM OF ISLAMIC LAW	319
7.2 A BRIEF HISTORY OF CODIFICATION IN ISLAMIC LAW	323
7.3 THE METHOD OF CODIFICATION IN ISLAMIC LAW.....	330
7.3.1 <i>The Casuistic Method</i>	331
7.3.2 <i>The Abstract (Normative) Method in Law</i>	334
7.3.3 <i>Special Aspects of the Codification of Islamic Law</i>	336
7.4 SOME PERCEPTIONS OF ISLAMIC LAW	338
8 THE IMPLEMENTATION OF ISLAMIC LAW AND ITS FUTURE.....	341
8.1 THE IMPLEMENTATION OF ISLAMIC LAW	341
8.2 THE FUTURE OF ISLAMIC LAW	345
8.2.1 <i>The Future of Islamic Law in Muslim Countries</i>	345
8.2.2 <i>The Future of Islamic Law in non-Muslim Countries</i>	349
8.3 THE ISLAMIC JURISPRUDENCE ENCYCLOPEDIA.....	351
8.3.1 <i>The Project of the Faculty of Sharî'ah at Damascus University</i>	353
8.3.2 <i>The Project of the Higher Committees' Council for Islamic Affairs in Cairo</i>	354
8.3.3 <i>The Project of the Islamic Jurisprudence Encyclopedia in Kuwait</i>	354
8.4 INSTITUTIONS OF ISLAMIC FIQH (MAJMA' AL-FIQH AL-ISLÂMÎ)	356
8.5 EUROPEAN COUNCIL FOR FATWÂ AND RESEARCH	358
REFERENCES.....	359
INDEX	379

1 SHARÎ'AH, FIQH AND ISLAMIC LAW

1.1 Definitions

1.1.1 Sharî'ah (Shar' or Shar'-i Sharîf)

The term *Sharî'ah* is the general name given to Islamic law and refers to the body of Islamic Law. It means "way" or "road to the water source," "path to be followed", "the way to the source of life" and it is the legal framework within which the public and private aspects of life are regulated for those living in a legal system based on Islamic principles of jurisprudence and for Muslims living outside the borders of an Islamic country. We can use *shar'* or *shar'-i sharîf* as well. A road signifies a wide path between two boundaries, and thus *Sharî'ah* is a broad road whose parameters are what is obligatory and what is forbidden.¹ With respect to this meaning the Qur'an says: "Then We put thee on the (right) Way of Religion (*Sharî'ah*): so follow thou that (way), and follow not the desires of those who know not."² *Sharî'ah* refers to the Islamic law, includes the totality of God's commandment, and deals with many aspects of day-to-day life, including politics, economics, banking, business, contracts, family, sexuality, hygiene, and social issues. In its general meaning, as the law, *Sharî'ah* constitutes a divinely ordained path of conduct that guides Muslims toward a practical expression of his religious conviction in this world and the goal of divine favor in the world to come. This definition includes matters of conduct (*'amaliyyât*) as well as matters of belief (*i'tiqâdiyyât*), and of ethics (*akhlâqiyyât*). Here Islamic law (*fiqh*) is only a part of *Sharî'ah*. This term is similar to *Dîn* or Islam. In this narrow sense, *Sharî'ah* refers to the complete rules of Islam that relate to matters of conduct (*'amaliyyât*). That is similar to *fiqh* or Islamic Law.³ We call someone who is an expert

¹ Mannâ' al-Qattân, *Târîkh al-Tashrî' al-Islamî* (Beirut: al-Risâlah, 1987), pp. 14-16; al-Bukhari, Abu Abdullah, Muhammad ibn Isma'il (194/810—256/870): *El-Jâmi' al-Sahîh* (Cairo: Kitâb al-Îmân, n.d.); cf. Hisham M. Ramadan, *Understanding Islamic Law: from Classical to Contemporary*, (Oxford: Rowman Altamira, 2006), pp. 3ff.

² The *Qur'an* 45:18; 57:24; 16:90; 4:104, 135.

³ Abdulkarim Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah* (Baghdad, Matba'ah al-Ânî, 1977), pp. 38-40; Sa'd al-Dîn Mas'ûd al-Taftazânî, *al-Talwîh ilâ Kashf Haqâiq al-Tanqîh*, vol. I, (Beirut, Dâr al-Arqam, 1998), p. 21; Nicolas Aghnides, *Islamic Theories of Finance: With An Introduction to Islamic Law and a Bibliography* (New York: Columbia University, 1916), p. 23; cf. Maurits S. Berger, *Klassieke Sharî'a en vernieuwing*, WRR webpublicatie nr. 12 (Amsterdam: Amsterdam University Press, 2006), p. 13; Irshad Abdal-Haqq, "Islamic Law: An Overview of its Origin and Elements," Hisham M. Ramadan, *Understanding Islamic Law: from Classical to Contemporary*, (Lanham: Rowman Altamira, 2006), pp. 4-8.

on Islamic law a *faqih*.⁴

The concept of *Shari'ah* has been completely confused in legal and common literature. For some Muslims, *Shari'ah* includes the Qur'an and the *Sunnah*. For others, it also includes classical *fiqh*. We can easily distinguish clearly between two meanings of *Shari'ah*. There must be no confusion here,⁵ although we cannot understand why some scholars use the term "*paradigm of Shari'ah*."⁶ In a general sense, the word *shari'ah* has been used to include not only the substantive rules of the Qur'an and Sunnah, but also all the rules derived from them by the way of *ijtihad* (*juristic techniques*). Unfortunately many of these ordinances are viewed by a few modern scholars as responses to particular historical or social situations. We think that main rules of *Shari'ah* are solely legal and religious rules of the Qur'an and Sunnah; but other ordinances would be viewed as the result of jurisprudential methods. The distinction between *shari'ah* and *fiqh* is clear; but these concepts have been confused by some scholars.⁷

We do not agree that there are three kinds of *Shari'ah* (*fiqh*, God's Ideal Legal System and different kinds of Islamic law in Muslim countries). *Shari'ah* is one and its sources are the same for all. But some interpretations relating to *ijtihad* rules may differ, as we will explain in the following chapters. That is the case in all legal systems.⁸

There are elements in the "secularized" way of life in Europe that may offend Muslims, not only as a strange and foreign customs, but also as outright contrary to basic Islamic principles. This is sometime reflected in the conflict between *Shari'ah* and civil legislation in European States.⁹

1.1.2 *Fiqh (Islamic Law)*

The word *fiqh* is an Arabic term meaning "deep understanding" or "full compre-

⁴ See Jasser Auda, *Maqâsid al-Shari'ah as Philosophy of Islamic Law* (London: The International Institute of Islamic Thought, 2008), pp. 56-57.

⁵ Cf. Auda, *Maqâsid al-Shari'ah*, p. 59.

⁶ Nasr Abu Zaid, *Reformation of Islamic Thought: A Critical Historical Analysis*, WRR Verkenning nr. 10 (Amsterdam: Amsterdam University Press, 2006), pp. 14-15.

⁷ Ralph H. Salmi, Cesar Adib Majul and George Kilpatrick Tanham, *Islam and Conflict Resolution: Theories and Practices*, (University Press of America, 1998), pp. 61-3; Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law*, (Oxford University Press US, 2005), pp. 206-07.

⁸ Berger, *Klassieke Shari'a en Vernieuwing*, pp. 16-18; Maurits Berger, "Shari'a in Europa? Welke Shari'a," *Eutopia*, October 2005, nr. 11.

⁹ Conference of European Churches, *Witness to God in a Secular Europe*, (Geneva: 1985), p. 46.

hension.”¹⁰ Technically, the science that derives the *Shari'ah* values and rules from *Shari'ah* sources is the “science of *fiqh*”, “*furû' al-fiqh*” or simply *fiqh*, and the person knowledgeable in this science is a *faqîh*. The historian ibn Khaldun describes *fiqh* as “knowledge of the rules of God that concern the actions of persons who deem themselves bound to obey the law respecting what is required (*wâjib*), forbidden (*harâm*), recommended (*mandûb*), disapproved (*makrûh*) or merely permitted (*mubâh*).”¹¹

There are two main definitions of *fiqh* in Islamic sources. *Fiqh* has been defined by Abu Hanîfa in a general way as “the one’s knowledge of what is to its advantage and disadvantage.” This definition, it will be observed, is very broad and includes matters of conduct (*'amaliyyât*) as well as matters of belief (*i'tiqâdiyyât*) and of ethics (*akhlâqiyyât*). Some have restricted *fiqh* to matters of conduct, such as civil transactions (*mu'âmalât*) and religious ritual (*'ibâdât*).¹² That is similar to *Shari'ah*.

Fiqh has also been defined in a specific way by other Muslim *fuqahâ* as “the deduction of the *Shari'ah* values relating to conduct from their respective particular (*tafsîlî*) evidences.” With the use of the term “*Shar'iyyah*,” the intention is to exclude intellectual and perceptual values, such as the obligation of belief in God and the Prophets. The word “conduct” (*al-'amaliyyah*) excludes points of theory, such as the position that the *ijmâ'* is lawful evidence for the establishment of *Shari'ah* values. “Deduction” (*mustanbatah*) excludes knowledge acquired from a *mujtahid* instead of by direct inquiry into the evidence.¹³

According to this, a person is not called a *faqîh* if he knows only *Shari'ah* values. He is called a *faqîh* only if he has, through personal inquiry and thought, deduced that values himself. This definition follows Shâfi'ite scholars. The Hanafite definition and the one adopted in the modern Ottoman civil code (*Majalla*) ignore the way in which this knowledge has been obtained. Consequently, mere knowledge of *Shari'ah* values

¹⁰ The Qur'an, Taha, 20: 27-28; Nisa, 4: 78; Wahba al-Zuhaylî, *al-Fiqh al-Islamî wa Adillatuhû*, (Dams-cus: Dâr al-Fikr, 1997), 11 vols. v. I, p. 29.

¹¹ Abdurrahman ibn Khaldun, *Târîkh ibn Khaldun, Kitâb al-Ibar wa Dîwân al-Mubtadâ wal Khabar fi Ayyâm al-'Arab wal-'Ajam wal-Barbar wa man Asarahum min Zawi al-Sultan al-Akbar*, vol. I (Beirut: Dar al-Kutub al-Ilmiyyah, 1992), p. 476; Bedruddîn Muhammad al-Zarkashî, *al-Bahr al-Muhîr Fî Usûl al-Fiqh*, vol. I (Kuwait City: Kuwait Ministry of Awqâf, 1988), pp. 21-27; Reuben Levy, *The Social Structure of Islam* (Cambridge: Cambridge University Press, 1957), p. 151; Muhammad ibn 'Ali ibn-Muhammad al-Shawkani, *Irshâd al-Fuhûl*, vol. I (Cairo: Dar al-Kutub, 1992), pp. 47-48; Abdulkarim ibn Ali ibn Muhammad al-Namlah, *Ithâf Dhawil-Basair bi Sharh Rawdhah al-Nazir fi Usûl al-Fiqh*, vol. I (Riyadh: Dar al-Asimah, 1996), pp. 53-59; Auda, *Maqâsid al-Shari'ah*, pp. 56-57.

¹² Al-Taftazânî, *al-Talwîh ilâ Kashf Haqâiq al-Tanqîh*, vol. I, pp. 31-34; Aghnides, *Islamic Theories of Finance*, p. 24; Mu'awwadh and Abdulmawjûd, *Târîkh al-Tashrî' al-Islamî*, vol. I, pp. 49-56; al-Zuhaylî, *al-Fiqh al-Islamî wa Adillatuhû*, v. I, pp. 29-30.

¹³ Al-Namlah, *Ithaf Dhawil-Basair bi Sharh Rawdhah al-Nazir*, vol. I, pp. 59-70; cf. Berger, *Klassieke Shari'a en vernieuwing*, pp. 14-15; Zuhaylî, *al-Fiqh al-Islamî*, v. I, pp. 30-1.

is *fiqh* and the person who has this knowledge is a *faqîh*. In other words, a *faqîh* need not be a *mujtahid*.¹⁴

Finally, the term “particular” indicates that the premises that *fiqh* uses are not directly obtained from the four bases of *Sharî‘ah*, namely, the Qur‘an, the *Sunnah*, *ijmâ‘* and the *qiyâs*. These sources, as they stand, are too general (*ijmâlî*) and are not available for the purposes of *fiqh* until they have been reduced by a particular science to logical propositions, each relating to one particular set of values. Then the term Islamic law generally is used in reference to the entire system of law and jurisprudence associated with Islam, including the primary sources of law and the subordinate sources of law and the methodology used to deduce and apply the law.

In summary, *fiqh* relates to:

- Human acts that are entirely a matter of divine rights (*huqûq al-lah=public rights*), namely, (a) prayers (*salâh*), (b) fasting (*sawm*), (c) legal alms (*zakâh*), (d) war (*jihâd*), covering war and peace, the latter including the fiscal and other relations of the Muslim state to its non-Muslim subjects, and (e) pilgrimage to Mecca. We can say this part constitutes worship jurisprudence.
- Human acts that are entirely a matter of private rights (*huqûq al-‘ibâd*).
- Human acts of a mixed nature, namely, the tithe (‘*ushr*’)¹⁵.

We can summarize by saying that the term *fiqh* corresponds to Islamic Law, whereas *Sharî‘ah* corresponds to *Dîn* or *Islam* completely. But, unfortunately, many scholars are confused about this difference and think that *Sharî‘ah* is only Islamic Law. For that reason we call religious rules that have been sent to us completely *Sharî‘ah*. In its general sense, *fiqh* includes only matters of conduct (‘*amaliyyât*’) and excludes matters of belief (‘*‘itiqâdiyyât*’) and of ethics (*akhlâqiyyât*).¹⁶

1.1.3 *Qânun* and ‘*Urf*’

Qânun is a Persian word that was arabized to mean principles or *usûl*, and since the beginning of the Ayyubid and Ottoman states it has come to mean written laws or

¹⁴ Al-Taftazânî, *al-Talwîh ilâ Kashf Haqâiq al-Tanqîh*, vol. I, pp. 34-38; Zaidan, *al-Madkhal Li Dirâsah al-Sharî‘ah al-Islâmiyyah*, pp. 38-40; Ahmed Akgunduz and Halil Cin, *Türk Hukuk Tarihi*, vol. I, pp. 113-14.

¹⁵ Mu‘awwadh and ‘Abdulmawjûd, *Târikh al-Tashrî‘ al-Islâmî*, vol. I, pp. 56-66; Aghnides, *Islamic Theories of Finance*, pp. 28-29.

¹⁶ Muhammad Amîn ibn ‘Âbidîn, *Radd al-Muhtâr alâ al-Durr al-Muhktâr*, vol. I (Damsacus, Dâr al-Thaqâfah wa al-Turâth, 2000), pp. 121-34; cf. Abdal-Haqq, “Islamic Law: An Overview of its Origin and Elements,” Hisham M. Ramadan, *Understanding Islamic Law*, pp. 3-4.

legal codes. Written laws, in countries that endorse Islamic law as the legal system, could be derived directly from *fiqh*. The Majalla (Civil Code of the Ottoman State) is a good example of this. I published 760 *Qânûnnâme* (the book of *qânûns*) in my work *Osmanli Qânûnnâmeleri ve Hukuki Tahlilleri*. This meaning has applied to family and inheritance law in Muslim countries like Egypt and Iraq since the collapse of the Ottoman State.¹⁷ In form, *qânûns* could be either single statutes or collections of statutes devoted to a single subject. From time to time a number of *qânûns* have been brought together in the form of *qânûnnâme* (the book of *qânûns*), which might be special or of general application.¹⁸

The *qânûn* is subservient to the *Shari'ah*, and should only have regulated areas are the *Shari'ah* unclear, or have been practical specifications of the *Shari'ah*. If anybody read all legal codes (*qânunnâmes*) of Ottoman State, he or she would see that this rule hasn't change in history of Islamic law. The best example about relations between *shari'ah* and *qânûn* is the *firmân* of Mustafa II (1695-1703):

It is also highly perilous and most juxtapose the terms *shari'ah* and *qânûn*. Therefore in *firmâns* and decrees all matters shall for this reason be based on the firm support of the noble *shari'ah* only..... And warnings are given against the coupling of the terms noble *shari'ah* and *qânûn*.¹⁹

'*Urf* means custom or, more accurately, a good custom which the community and *Shari'ah* principles approve of. That is from secondary sources for Islamic law, which we will discuss in the second book of this work.²⁰

1.1.4 Muhammadan Law

Muhammadan (also written Mohammedan, Mahommedan, Mahomedan or Mahometan) is a term used both as a noun and as an adjective, and means belonging or relating to either the religion of Islam or to that of the Islamic prophet Muhammad. The term is now largely superseded by Muslim, Moslem or Islamic but was commonly used in Western literature until at least the mid-1960s.²¹ Muslim is more often used

¹⁷ Ahmed Akgunduz, *Osmanli Qânûnnâmeleri ve Hukuki Tahlilleri*, vol. I-IX, (Istanbul: OSAV, 1989-1992); Auda, *Maqâsid al-Shari'ah*, pp. 57-58.

¹⁸ Richard C. Repp, "Qânûn and Sahrî'a in the Ottoman Context," 'Azîz 'Azmah, *Islamic Law: Social and Historical Contexts*, (New York: Routledge, 2006), pp. 125-26.

¹⁹ Osman Nuri Ergin, *Majalla-i Umûr-i Belediye*, (Istanbul, 1338/1922), vol. I. p. 568; Cf. Repp, "Qânûn and Sahrî'a in the Ottoman Context," 'Azîz 'Azmah, *Islamic Law*, pp. 131-32; Vikør, *Between God and the Sultan*, p. 208.

²⁰ 'Ali Muhammad Mu'awwadh and Âdil Ahmad 'Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I (Beirut: Dâr al-Maktabah al-Ilmiyyah, 2000, pp. 16-7; Auda, *Maqâsid al-Shari'ah*, pp. 58-59.

²¹ See, for instance, the second edition of *A Dictionary of Modern English Usage* by H.W. Fowler, revised by Ernest Gowers (Oxford: Oxford Language, 1965).

today than Moslem, and the term Mohammedan is generally considered archaic or in some cases even offensive. Mohammedan was in use as early as 1681, along with the older term Mahometan, which dates back to 1529 at least.

In Christian Western Europe until the 13th century or so, some Christians believed that Muslims worshiped Mahomet, while other Christians considered him to be a heretic. Still other medieval European writers referred to Muslims as “pagans” or by sobriquets such as the paynim foe. Some works, like *The Song of Roland*, depict Muslims worshipping Muhammad as a god or worshipping various deities in the form of “idols” ranging from Apollo to Lucifer, but ascribing to them a chief deity known as “Termagant”. These and other variations on the theme were all set in the “temper of the times” of what was seen as a Muslim-Christian conflict since medieval Europe was constructing a concept of “the great enemy” in the wake of the quick-fire success of the Muslims through a series of conquests shortly after the fall of the Western Roman Empire and because of the lack of concrete information in the West about Islam and Muslims.²²

Unfortunately, during the Middle Ages the Christian world held a largely antagonistic view of Muhammad. This partly represented a lack of knowledge about the Muslim prophet but also stemmed from the fact that Islam and Christianity were secular and religious enemies throughout much of this period. Medieval scholars and churchmen held that Islam was the work of Muhammad who was in turn inspired by Satan. Muhammad was frequently calumnized and made a subject of legends taught as fact by preachers. For this reason they preferred to use the term Muhammadan Law rather than Islamic Law. English scholars especially affected Indian and Indonesian Muslim scholars and, as a result the latter have used the former term instead of Islamic Law.²³

We would like to convey the main account in the words of Asaf A. A. Fyzee, who called his work, *Outlines of Muhammadan Law*:

Now, first, an apology for the term *Muhammadan law*. The word itself is unsatisfactory and, spells it how you will, it does not improve. This ugly term as well as its variants Moohummudu (Baillie), Mahomedan (the Judicial Committee of the Private Council and most Indian Courts), Mahommedan (Nicholson), Muslim (Tyabji) and occasionally Mussalman are all open to serious objection. Strictly speaking, the religion taught by

²² Kenneth Meyer Setton, *Western Hostility to Islam and Prophecies of Turkish Doom* (American Philosophical Society, 1992). pp. 4-6; Montgomery Watt, *Muhammad: Prophet and Statesman* (Oxford: Oxford University Press, 1961), p. 229

²³ Setton, *Western Hostility to Islam*, pp. 5; See Shama Churun Sircar, *The Muhammadan Law: A Digest of the Law Applicable Especially to the Sunnis of India*, (Calcutta: Thacker, Spink and Co., 1873), pp. 1-6; Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, (Delhi: Oxford University Press, 1978).

the Prophet was Islam, not Muhammadisms. The system is called as *fiqh* and the term Islamic Law is used synonymously with it.²⁴

As we will explain in the next section, when we state that the origin of Islamic law is fundamentally the will of God, we mean the pure revelation and that Muhammad was the Messenger of God. In conclusion, we believe that Islamic law has originating from God. At the very least, it is based on a set of rules emanating from God through His revelation.

1.2 The Main Characteristics of Islamic Law

Islamic law (*fiqh*) is a divine legal system and has certain distinguishing characteristics. Let us summarize some of them:

1. The origin of Islamic law is different from the origin of contemporary legal systems. The first major distinction between *Shari'ah* and Western legal systems is the result of the Islamic concept of law as the expression of the divine will. With the death of the Prophet Muhammad in 632, communication of the divine will to humankind ceased; the terms of the divine revelation were thus henceforth fixed and immutable. Therefore, when considered the process of interpretation and expansion of this source material was held to be completed through the crystallization of the doctrine in the medieval legal handbooks, *Shari'ah* law became partly static and partly dynamic. We will explain this in the third book in the chapter on constitutional law.²⁵

The origin of Islamic law is fundamentally the will of God. The sources of law are the words of God, the Qur'an, the *Sunnah* of the Prophet Muhammad and sources derived from these two main sources. What they have in common is that they are all based on God's will. Islamic law, with God's will as its origin, effects equality, since it is sent to all humankind and cements its legitimacy through the spiritual emotions of religion. This point was defined specifically in the Ottoman Legal Family Decree (*Hukuk-i Aile Kararnamesi*) of 1917. Respect for persons in Islamic Law is rooted in the Divine injunctions of the Qur'an and the precepts of the Prophet.²⁶

2. Another distinguishing character of Islamic law is that it incorporates two means of sanctioning. Aside from punishments, invalidity and other such material sanctions, there is also a spiritual sanctioning of the human heart, mind and con-

²⁴ Fyzee, *Outlines of Muhammadan Law*, pp. 1-2.

²⁵ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 109-16; Zuhaylî, *al-Fiqh al-Islamî*, v. I, p. 32.

²⁶ Mannâ' al-Qattân, *Târikh al-Tashrî' al-Islamî* (Beirut: al-Risâlah, 1987), pp. 21-25; Zuhaylî, *al-Fiqh al-Islamî*, vol. I, pp. 33-6; cf. "Shari'ah" In *Encyclopedia Britannica*, <http://www.britannica.com/EBchecked/topic/538793/Shari'ah> (accessed June 6, 2009).

sciousness. There are a number of examples of this in Islamic law books. For example, trade executed after the call for *Jum'ah* prayer is *qadhâan* (according to legal judgment), i.e. legitimate according to the civil law. However, it is not permissible *diyânatân* (according to religious and ideal law). In the same way, a person who commits the crime of damaging private property has to pay reparation to the owner but also has other-worldly responsibilities for "attacking another's property."²⁷

It is true the government secret service and police cannot see me and I can hide from them, but the angels of a Glorious God who has a prison like Hell see me and are recording all my evil deeds. I am not free and independent; I am a traveler charged with duties. One day I too will be old and weak.²⁸

3. The scope of *Sharî'ah* is much wider, since it regulates the human being's relationship not only with his neighbors and the state, which is the limit of most other legal systems, but also the relationship with his God and his own conscience. Ritual practices, such as daily prayers, almsgiving, fasting and pilgrimage, are an integral part of *Sharî'ah* and usually occupy the first chapters in the legal manuals. *Sharî'ah* is also concerned as much with ethical standards as it is with legal rules, indicating not only what humans are entitled to or bound to do in law but also what they, in all conscience, ought to do or refrain from doing. Accordingly, certain acts are classified as praiseworthy (*mandûb*), which means that performing them brings divine favor and not performing them divine disfavor. Others acts are considered blameworthy (*makrûh*), which means that not performing them brings, divine favor and performing them divine disfavor. But in neither case is there any legal sanction of punishment or reward, nullity or validity. *Sharî'ah* is not merely a system of law but a comprehensive code of behavior that embraces both private and public activities.²⁹

Contemporary law systems regulate relationships between citizens and groups of citizens whereas Islamic Law also regulates the relationship between a person and God. This is why all *fiqh* books begin by describing regulations of religious services such as *salâh*, pilgrimage and fasting. The other subjects are listed in accordance with how close they lie to religious matters.³⁰

4. Through the principles of divine law Islamic Law has made it necessary for social and economic institutions as well as their laws to change. It has left interchangeable rules open to interpretation and has proclaimed that "*it is undeniable that some*

²⁷ Al-Qattân, *Târikh al-Tashrî' al-Islamî*, pp. 23-25; Zuhaylî, *al-Fiqh al-Islamî*, vol. I, pp. 37-8.

²⁸ Bediuzzaman Said Nursi, "Eighth Topic," in Said Nursi Bediuzzaman, *The Rays, The Fruits of Belief* (Istanbul, Sozler Publications, 2002) p. 245.

²⁹ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 56-66, 123-34.

³⁰ Cf. "Sharî'ah," In: *Encyclopædia Britannica*.

judgments will vary and change over time."³¹ In some areas Islamic Law did not provide any details; rather, the basic tenets were determined and the rest left in the hands of the judicial authority at the time. We can mention some tenets such as mutual consent in debt verdicts, the individualization of crime and punishment and the principle of *shûrâ* in constitutional law. The Qur'an says: "*and who manage their affairs by mutual consultation...*"; "*and consult with them about the matter*"³² The rule of "*necessities make the unlawful lawful*"³³ can also be applied to a variety of situations. The Qur'an mentions certain fundamental principles like freedom, justice, public interest (*maslahah mursalah*). In short, Islamic Law is an original jurisprudence with some very distinguishing characteristics.³⁴

Some modern scholars have tried to explain the features of development for Islamic law and claimed that "in the case of Islamic law, the essential attributes – those that gave it its shape – were four: (1) the evolution of a complete judiciary, with a full-fledged court system and law of evidence and procedure; (2) the full elaboration of a positive legal doctrine; (3) the full emergence of a science of legal methodology and interpretation which reflected, among other things, a large measure of hermeneutical, intellectual and juristic self-consciousness; and (4) the full emergence of the doctrinal legal schools, a cardinal development that in turn presupposed the emergence of various systemic, juristic, educational and practice-based elements."³⁵ These topics are the subjects of discussion, but here we have only mentioned the attributes of Islamic Law.³⁶

1.3 The Relation between Islamic Law and Other Legal Systems

1.3.1 The Influence of Islamic Law on Other Legal Systems

There is no doubt that the foundations of modern Western civilization, and of European philosophy of law, are to be found in the Middle Ages and Islamic legal thinking.³⁷

³¹ *Majalla al-Ahkâm al-Adliyyah* (The Ottoman Courts Manual (Hanafi)), Article 1801.

³² The Qur'an, 42:38; 3:159.

³³ *Majalla al-Ahkâm al-Adliyyah*, Article 21.

³⁴ Muhammad Ali Es-Sâ'yis, *Târîkh 'ul-Fiqh 'il-Islâmî* (Cairo: Dâr al-Kutub al-Ilmiyyah, d.n.), pp. 8-10; Zaidan, *al-Madkhal Li Dirâsah al-Shari'ah al-Islâmiyyah*, pp. 40-45; Zuhaylî, *al-Fiqh al-Islamî*, vol. I, pp. 39-41.

³⁵ Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2007), p. 3.

³⁶ Al-Qattân, *Târîkh al-Tashrî' al-Islamî*, pp. 20-25.

³⁷ Christopher Roederer and Darrel Moellendorf, *Jurisprudence*, (Lansdowne: Juta and Company Ltd, 2007), pp. 495ff.

A) *Comparisons with common law.* The methodology of legal precedent and reasoning by analogy (*qiyâs*) used in Islamic law was similar to that of the common law legal system. It has been suggested that several fundamental English common law institutions may have been derived or adapted from similar legal institutions in Islamic law and jurisprudence and introduced to England after the conquest of England by the Normans. The Normans had conquered and inherited the Islamic legal administration of the Emirate of Sicily and “through the close connection between the Norman kingdoms of Roger II in Sicily – ruling over a conquered Islamic administration – and Henry II in England” and also via the crusaders during the Crusades. The connection with Norman law in Normandy may be real, but it should be remembered that common law owes a great deal to Anglo-Saxon traditions and forms and in its current form represents an interaction between the two systems.³⁸

The *Waqf* in Islamic law, which developed during the 7th-9th centuries, bears a notable resemblance to trusts in the English trust law. For example, every *Waqf* was required to have a *wâqif* (truster, *mutawallîs* (trustee), *qâdhî* (judge) and beneficiaries. Under both a *waqf* and a trust, “property is reserved, and its usufruct appropriated, for the benefit of specific individuals or for a general charitable purpose; the corpus becomes inalienable; estates for life in favor of successive beneficiaries can be created,” and “without regard to the law of inheritance or the rights of the heirs; and continuity is secured by the successive appointment of trustees or *mutawallîs*.” The trust law developed in England at the time of the Crusades during the 12th and 13th centuries was introduced by Crusaders who may have been influenced by the *waqf* institutions they encountered in the Middle East.³⁹

The precursor to the English jury trial was the *Lafif* trial in classical Mâlikî jurisprudence, which was developed between the 8th and 11th centuries in North Africa and Islamic Sicily, and shares a number of similarities with later jury trials in English common law. Like the English jury, the Islamic *Lafif* consisted of twelve individuals chosen from the neighbourhood and sworn to tell the truth, bound to yield a unanim-

³⁸ The Normans gave their names to Normandy, a region in northern France. They were descended from the Viking conquerors of the territory and the native population of mostly Frankish and Gallo-Roman stock. Their identity emerged initially in the first half of the tenth century, and gradually evolved over succeeding centuries until they disappeared as an ethnic group in the early thirteenth century. The name “Normans” derives from “Northmen” or “Norsemen”, after the Vikings from Scandinavia who founded Normandy (*Northmannia* in its original Latin). They played a major political, military, and cultural role in medieval Europe and even the Near East. Cf. G. A. Loud and Alex Metcalfe, *The Society of Norman Italy*, (Leiden: Brill, 2002), pp. 297-98.

³⁹ Ahmed Akgunduz, *Islam Hukukunda ve Osmanli Tatbikatinda Vakif Muessesesi* (Istanbul: OSAV, 1996), pp. 76-100; Monica Gaudiosi, “The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College”, *University of Pennsylvania Law Review*, vol. 136, no. 4, 1988: 1231-261.

ous verdict, on matters "that they had personally seen or heard, binding on the judge, to settle the truth concerning facts in a case, between ordinary people, and obtained as of right by the plaintiff."⁴⁰

Islamic jurists formulated early contract law that introduced the application of formal rationality, legal rationality, legal logic and legal reasoning in the use of contracts. Islamic jurists also introduced the concepts of recession (*iqâlah*), frustration of purpose (*istihâlah al-tanfîdh* or "impossibility of performance"), Acts of God (*Âfât Samâwiyah* or "Misfortune from Heaven") and force majeure in contract law. Other possible influences of Islamic law on English common law include the concepts of a passive judge, impartial judge, *res judicata*, the judge as a blank slate, individual self-definition, justice rather than morality, rule of law, individualism, freedom of contract, the right against self-incrimination, fairness over truth, individual autonomy, untrained and transitory decision making, overlap in testimonial and adjudicative tasks, appeal, dissent, day in court, prosecution for perjury, oral testimony, and the judge as a moderator, supervisor, announcer and enforcer rather than adjudicator.⁴¹

Similarities between Islamic law and American common law have also been noted, particularly with regard to constitutional law. According to Asifa Quraishi, the methods used in the judicial interpretation of the constitution are similar to those in the Qur'an, including the methods of "plain meaning, literalism, historical understanding 'originalism,' and reference to underlying purpose and spirit."⁴²

The earliest known lawsuits may also date back to Islamic law. There was a *hadîth* tradition that reported that the Caliph 'Uthman ibn Affan (580-656) attempted to sue a Jewish subject for recovery of a suit of armour. His case was unsuccessful, however, due to a lack of competent witnesses.

Precursors to common law concepts in property law were found in classical Islamic property law, including the concepts of leasehold (including duty to take and keep property in possession and holdover tenancy), joint ownership (including partition, pledge, bailment, lost property, license and trespass), acquisition (including intestate succession), duress (*ikrâh*), transfer by sale (including contract formation, meeting of the minds, declaration, duress and risk of loss), transfer by gift, rights and

⁴⁰ Ziba Mir-Hosseini, *Marriage on Trial: Islamic Family Law in Iran and Morocco*, (I.B.Tauris, 2000), p. 101.

⁴¹ Akgunduz, *Türk Hukuk Tarihi*, vol. II, pp. 215, 234-35; John Makdisi, "Formal Rationality in Islamic Law and the Common Law," *Cleveland State Law Review* 34 (1985-6): 97-112; Jâmila Hussain, "Book Review: The Justice of Islam by Lawrence Rosen", *Melbourne University Law Review* (2001): p. 30.

⁴² Asifa Quraishi, "Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence," *Cardozo Law Review* 28 (2006): 67-121 [68].

restrictions on transfers (including restraint on alienation, appurtenance, fixture, preemption, mortgage and water rights), will (including entitlement to shares, revocation, ademption, lapse, abatement and ambiguity), attacks on ownership (including concepts of theft, robbery, usurpation, nuisance, and defense of necessity) and causation (including remote consequences, intervening human cause, concurrent cause and uncertain cause). Many of these concepts were summarized in Islamic juristic texts, including the *Hidâyah* by the Hanafî jurist al-Marghinani, the *Minhâj al-Tâlibîn* by the Shâfi'î jurist Yahya ibn Sharaf al-Nawawi, the *Mukhtasar* by the Mâlikî jurist Khalil ibn Ishaq al-Jundi, and the *Fatâwâ-i 'Âlamgirî* by Hanafî jurists.⁴³

B) *Influence on civil law.* One of the institutions developed by classical Islamic jurists that influenced civil law was the *hawâlah*, an early informal value transfer system, which is mentioned in texts of Islamic jurisprudence as early as the 8th century. *hawâlah* itself later influenced the development of the *Aval* in French civil law and the *Avallo* in Italian law. The "European commenda" limited partnerships (Islamic *qirâd*) used in civil law as well as the civil law conception of *res judicata* may also have its origins in Islamic law.⁴⁴

Islamic law also introduced "two fundamental principles to the West, on which the future structure of law would later stand: equity and justice."⁴⁵ These principles were precursors to the concept of *pacta sunt servanda* in civil law and international law. Another influence of Islamic law on the civil law tradition was the presumption of innocence, which was introduced to Europe by Louis IX of France soon after he returned from Palestine during the Crusades. Prior to this, European legal procedure consisted of either trial by combat or trial by ordeal. In contrast, Islamic law was based on the presumption of innocence from the beginning, as declared by the Caliph 'Umar in the 7th century: "Decide only on the basis of proof, be kind to the weak so that they may express themselves freely and without fear, deal on an equal footing with litigants by trying to reconcile them."⁴⁶

The concept of ombudsman was derived from the example of the second Muslim caliph, 'Umar (634-644), and the concept of *Qâdhî al-Qudhât* (developed in the Muslim world), which influenced the Swedish King Charles XII. In 1713, fresh from self-

⁴³ Asifa Quraishi, "Interpreting the Qur'an and the Constitution," *Cardozo Law Review* 28 (2006): 67-121 [68].

⁴⁴ Cf. Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: a Critique of the 'Clash of Civilizations' in the New World Order*, (Oregon: Hart Publishing, 2005), pp. 47-50.

⁴⁵ Ali Haydar, *Durar al-Hukkâm Sharhu Majalla al-Ahkâm*, (trans. into Arabic by Fahmi al-Husayni) v. I (Beirut: Publisher, n.d.), pp. 17-20 (in Arabic).

⁴⁶ Ibn al-Qayyim al-Jawziyya, *I'âm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. I (Beirut: Dar al-Kutub al-Ilmiyyah, 1996), p. 70.

exile in Turkey, Charles XII created the Office of Supreme Ombudsman, which soon became the Chancellor of Justice.⁴⁷

C) *Influence on international law.* The first treatise on international law (*Siyar* in Arabic) was the Introduction to the Law of Nations written at the end of the 8th century by Muhammad al-Shaybânî (804), an Islamic jurist of the Hanafî school, eight centuries before Hugo Grotius wrote the first European treatise on the subject. Al-Shaybani wrote a second, more advanced treatise on the subject, and other jurists soon followed with other multi-volume treatises on international law written during the Islamic Golden Age. They dealt with both public international law and private international law.⁴⁸

These early Islamic legal treatises covered the application of Islamic ethics, Islamic economic jurisprudence and Islamic military jurisprudence to international law, and were concerned with a number of modern international legal topics, including the law of treaties; the treatment of diplomats, hostages, refugees and prisoners of war; the right of asylum; conduct on the battlefield; the protection of women, children and non-combatant civilians; contracts across the battle lines; the use of poisoned weapons; and the devastation of enemy territory. The Umayyad and Abbasid caliphs were also in continuous diplomatic negotiations with the Byzantine Empire on matters such as peace treaties, the exchange of prisoners of war, and payment of ransoms and tributes.⁴⁹

The Islamic principles of international law were largely based on the Qur'an and the *Sunnah* of Muhammad, who gave various injunctions to his forces and adopted practices concerning the conduct of war. The most important of these were summarized by Muhammad's successor and close companion, Abu Bakr, in the form of ten rules for the Muslim army:

O people, so that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Do not kill a child, a woman, or an aged man. Bring no harm to the trees, nor burn them with fire, especially those that bear fruit. Slay none of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone.⁵⁰

⁴⁷ Marcel A. Boisard, "On the Probable Influence of Islam on Western Public and International Law," *International Journal of Middle East Studies* 11 (1980): 429-50; V. Pickl, "Islamic Roots of Ombudsman System," *The Ombudsman Journal*, Number 6 (1997): pp.101-08.

⁴⁸ Ahmad al-Serakhsi, *Sharh al-Siyar al-Kabîr*, Vol. I-IV (Cairo: al-Maktabah al-Islâmiyyah, 1971); Rehman, *Islamic State Practices, International Law*, pp. 48-50.

⁴⁹ Akgunduz, *Türk Hukuk Tarihi*, vol. I, pp. 437-38, 449-52.

⁵⁰ 'Ali ibn Muhammad ibn al-Athir, *al-Kâmil fî al-Târikh*, vol. II (Beirut: Dar Sadir, 1995), p. 335.

There is evidence that early Islamic international law influenced the development of Western international law through various routes such as the Crusades, the Norman conquest of the Emirate of Sicily, and the Reconquista of al-Andalus. In particular, the Spanish jurist Francisco de Vitoria and his successor Grotius may have been influenced by Islamic international law through earlier writings influenced by Islam such as the 1263 work *Siete Partidas* by Alfonso X, which was regarded as a “monument of legal science” in Europe at the time and was influenced by the Islamic legal treatise *Villiyet* written in Islamic Spain.⁵¹

D) *Influence on legal education.* Madrasahs were the first law schools, and it is likely that the “law schools known as Inns of Court in England” may have been derived from the madrasahs, which taught Islamic law and jurisprudence.

The origins of the doctorate dates back to the *ijâzat at-tadrîs wa'l-iftâ* (“license to teach and issue legal opinions”) in the medieval Islamic legal education system, which was equivalent to the Doctor of Laws degree and was developed during the 9th century after the formation of the *Madhhab* legal schools. To obtain a doctorate, a student “had to study in a guild school of law, usually four years for the basic undergraduate studies” and ten or more years for post-graduate studies. The “doctorate was obtained after an oral examination to determine the originality of the candidate’s theses,” and to test the student’s “ability to defend them against all objections, in disputations set up for the purpose” which were scholarly exercises practiced throughout the student’s “career as a graduate student of law.” After students completed their post-graduate education, they were awarded doctorates, giving them the status of *faqîh* (master of law), *muftî* (professor of legal opinions) and *mudarris* (teacher), which were later translated into Latin as magister, professor and doctor respectively.⁵²

1.3.2 Relation to other Legal Systems

The question of the influence of foreign, particularly Roman law upon Islamic law has been much debated, with some scholars assuming a profound influence of Roman law upon Islamic law, while others deny practically any influence. For this reason we

⁵¹ J. Kelsay, “al-Shaybani and the Islamic Law of War,” *Journal of Military Ethics* 2 (2003): 63-75; H. Yousuf Aboul-Enein and Sherifa Zuhur, *Islamic Rulings on Warfare*, Strategic Studies Institute, US Army War College (Darby: Diane Publishing Co.), p. 22.

⁵² Cf. Akgunduz, *Türk Hukuk Tarihi*, vol. I, pp. 266-76; John A. Makdisi, “The Islamic Origins of the Common Law,” *North Carolina Law Review* 77 (1999): 1635-1739; cf. Shaikh M. Ghazanfar, *Islamic Civilization: History, Contributions, and Influence: a Compendium of Literature*, (Lanham: Scarecrow Press, 2006), pp. 399ff.

should indicate to some points.⁵³

A) Islamic law only abrogates rules that are in disagreement with its teachings. The Qur'an, on the whole, confirms the Torah and the Bible, and whenever a ruling of the previous scriptures is quoted without abrogation, it becomes an integral part of Islamic *Shari'ah*. So, Islamic Law accepts *revealed laws preceding the Shari'ah of Islam (Shar'iyi'u Man Qablanâ)* as one of its secondary sources.⁵⁴ Islamic Law can benefit from any legal system whenever there is no explicit *Shar'î* injunction on that issue and it does not contradict *Ahkâm Shar'iyyah*. For this reason Islamic Law has benefited from old customs and rules on administrative and military law.⁵⁵

It can also be expected that some influence by Talmudic jurisprudence, with its basis in the Torah, and Roman jurisprudence, which was influenced by Christianity, can be found within Islamic law, as long as they are not contrary to basic Islamic principles.

B) *Influence of Roman law on Islamic Law*. Roman law is the legal system of ancient Rome. As used in the West, the term commonly refers to legal developments prior to the Roman/Byzantine state's adoption of Greek as its official language in the 7th century. As such, the development of Roman law covers more than one thousand years from the law of the Twelve Tables (449 BCE) to the Corpus Juris Civilis of Emperor Justinian I (around 530 CE). Roman law, as preserved in Justinian's codes, became the basis of legal practice in the Byzantine Empire and later in continental Europe as well as Ethiopia.

It is somewhat interesting that some statements have been made by certain Western judicial scholars to the effect that "Islamic Law is but the Roman Law of Justinian in Arab dress" or that the "Arabs added nothing to Roman law but a few mistakes." Arabists like von Kremer⁵⁶ and Goldziher⁵⁷ are among those who have made

⁵³ Cf. Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases, & Materials*, (New York: SUNY Press, 1975), pp. 33-8.

⁵⁴ Fuat Bizans Köprülü, "Müesseselerinin Osmanlı Müesseselerine Te'siri Hakkında Bazı Mülâhazalar," *Türk Hukuk ve İktisat Tarihi Mecmuası*, no. 1, pp. 165-72; Ahmad al-Serahsi, *Sharh al-Siyar al-Kabîr*, Vol. I-IV (Cairo:1971).

⁵⁵ 'Abd al-Wahhâb Khallâf, *Ilm Usûl al-Fiqh*, 20th ed. (Kuwait City: Dar al-Qalam, 1986), pp. 94, 220.

⁵⁶ Alfred von Kremer (May 13, 1828 in Vienna; 1889) was an orientalist. At Vienna he first studied philosophy, then jurisprudence, and traveled from 1849-1851 to Syria and Egypt through a stipend from the academy of the sciences. His most famous work was *Culturgeschichte des Orients unter den Chalifen* (Vienna: 1875-77).

⁵⁷ Ignâc (Yitzhaq Yehuda) Goldziher (June 22, 1850 – November 13, 1921), often credited as Ignaz Goldziher, was a Hungarian orientalist and is widely considered to be among the founders of modern Islamic studies in Europe. He was the first Jewish scholar to become a professor at Budapest University (1894), and represented the Hungarian government and the Academy of Sciences at numerous international congresses. He received the gold medal at the Stockholm Oriental Con-

such claims. The mighty river of Roman law had doubtlessly inundated the valleys of Europe, but it certainly did not irrigate the desert of Arabia. To the contrary: Fitzgerald⁵⁸ states that “there is no evidence of such borrowing, and indeed the whole idea is absurd.”⁵⁹

There are many central differences between them. *First*, Islamic Law is based on Revelation whereas Roman law is the Lawyers’ Law. *Second*, being of divine origin, Islamic Law is virtually and mostly immutable, and, finally, it is wider in scope than Roman law, for it includes, in addition to public and private laws, even international relationships of which the Arabs were the pioneers. Roman law was codified in digest forms like the 12 Tables, but the Islamic *Sharī‘ah*, being ideal and valid for all ages, cannot properly be codified by such dynamic elements as *Ijtihād* (fresh thinking), *Ijmā‘* (consensus), etc.⁶⁰

The first scholar to point out that a comparison of Roman and Islamic Law would be of interest was Reland⁶¹, a professor of oriental languages at Utrecht in 1708. The *a priori* case for Roman influence on *Sharī‘ah* was forcefully put by two professional lawyers, Gatteschi and Sheldon, who wrote in 1865 and 1883 respectively. Neither knew Arabic. In 1875 von Kremer discussed the question extensively in his *Culturschichte*. In 1890 he published his *Muhammadanische Studien* in which he showed how *Hadīths* reflected the legal and doctrinal controversies of the two centuries after the death of Muhammad rather than the words of Muhammad himself. He was a strong believer in the view that Islamic Law owes its origins to Roman law, but in Patricia Crone’s view his arguments are “uncharacteristically weak” here. In the 1950s

gress in 1889. He became a member of several Hungarian and other learned societies and was appointed secretary of the Jewish community in Budapest. He was granted a Litt.D. from Cambridge (1904) and an LL.D. from Aberdeen (1906). His eminence in the sphere of scholarship was due primarily to his careful investigation of pre-Islamic and Islamic law, tradition, religion and poetry, in connection with which he published a large number of treatises, review articles and essays contributing to the collections of the Hungarian Academy.

⁵⁸ Forster Fitzgerald Arbuthnot (1833–1901) was a notable British Orientalist and translator. His early career was spent as a civil servant in India; his last post was as Collector for the Bombay government. He wrote *Arabic Authors*, *The Mysteries of Chronology*, *Early Ideas* (1881, under the pseudonym Anaryan) and *Sex Mythology, Including an Account of the Masculine Cross* (1898, privately printed), which attempts to trace the phallic origins of religious symbols. His main work is *Arabic Authors: A Manual of Arabian History and Literature*.

⁵⁹ Cf. Herbert J. Liebesny, *The Law of the Near and Middle East: Readings, Cases, & Materials*, (Albany: New York State University Press, 1975 pp. 33-6.

⁶⁰ Patricia Crone, *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate* (Cambridge: Cambridge University Press, 1987), pp. 1-7; Sa‘īd al-‘Ashmāwī, *al-Sharī‘ah al-Islāmiyya wa-l-Qānūn al-Misrī* (Cairo: Maktabah Madbūlī al-Saghīr, 1996).

⁶¹ Adriaan Reland (1676-1718) was a Dutch scholar, cartographer and philologist.

Schacht⁶² was the leading Western scholar on Islamic law, whose *Origins of Muhammadan Jurisprudence* (1950) is still considered one of the most important works ever written on the subject, essential for all advanced studies. He resumed Goldziher's work on the Islamic tradition. His writings on these subjects were uncharacteristically poor. Sava Pasha, who was an Ottoman Christian jurist, rejected Goldziher's view and wrote that Islamic Law is derived exclusively from the Word of God and the conduct of the Prophet. When Goldziher insisted on Roman influence in his review, attributing Pashas' "naivete" to his oriental origins, Pasha wrote a vehement reply, affirming his position on the origins of *Shari'ah* and pointing out that whereas he himself (a Greek Christian) was an Aryan, Goldziher (a Hungarian Jew) was a Turanian whose aggressiveness arose from the fact that he still had some drops of Mongol blood in his veins.⁶³

But, fundamentally, Islamic law was not derived from Roman law as some orientalists claimed. It would be unreasonable to claim that the Prophet Muhammad, who had gone to Damascus twice at the ages of 9 and 24, could have memorized Roman law without knowing Greek, Syriac or Latin, and was illiterate. Furthermore, Roman influence was weak in the areas in which Islam arose. Most importantly, it is impossible to find a trace of Christian belief in *fiqh* books and Islamic lawyers. There are also no similarities in terms of basic tenets and the frameworks of Islamic and Roman jurisprudences. To quote Sava Pasha,

I had believed for some time in the idea of some so-called jurists of our time that Islamic law was derived from Roman law. However, after long and detailed studies with the sources of Islamic law, I have come to the conclusion that this argument has no merit and depends more on imagination than on strong evidence.⁶⁴

⁶² Crone, *Roman, Provincial and Islamic Law*, pp. 1-17, 102-08; Ignâc Goldziher, *Muhammadische Studien*, vol. I (1889-90), p. 188n, v, II, pp. 75f; Sava Pasha, *Etudes sur la theorie du droit musulman*, vol. I (Paris: Marchal et Billard, 1892-1898) pp. xviff, xxi; Sava Pasha, *Le droit musulman explique* (Paris: 1896), p. 26; Joseph Schacht, *Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press 1950), p. vii; Von Kremer, *Culturgeschichte*, vol. I, ch. 9, pp. 532ff. Cf. Sava Pasha, *Islâm Hukuku Nazariyâtı Hakkında Bir Etüd*, I/VIII-IX; Zaidan, *al-Madkhal Li Dirâsah al-Shari'ah al-Islâmiyyah*, pp. 73-89; Yusuf Ziya Kavakçı, *Suriye Roma Kodu Ve Islâm Hukuku* (Ankara: Atatürk Üniversitesi, 1975), p. 76.

⁶³ Joseph Schacht, born in Ratibor, March 15, 1902 and died in Englewood, August 1, 1969, was a British-German professor of Arabic and Islam at Columbia University in New York. He was the leading Western scholar on Islamic Law, whose *Origins of Muhammadan Jurisprudence* (1950) is still considered one of the most important works ever written on the subject, essential for all advanced studies. The author of many articles in the various editions of the *Encyclopaedia of Islam*, Schacht also edited *The Legacy of Islam* for Oxford University Press. Other books include *An Introduction to Islamic Law* (1964).

⁶⁴ Sava Pasha, *Islâm Hukuku Nazariyâtı Hakkında Bir Etüd*, I/VIII-IX; Zaidan, *al-Madkhal Li Dirâsah al-Shari'ah al-Islâmiyyah*, pp. 73-89; Kavakçı, *Suriye Roma Kodu Ve Islâm Hukuku*, p. 76.

C) The other divine jurisprudences and Islamic jurisprudence also interact. The origin of and point of anchorage for all legal systems is God's will. Since Islamic Law is the final divine body of law, it has invalidated all previous ones. It is the fruit of the revelation sent down to Prophet Muhammad. Despite some influence by other legal systems, the framework itself is not derived from any other jurisprudence.

It must be mentioned that *there are two kinds of injunctions in Islamic Law*. A further point that is a cause for confusion is raising the suspicion that, prior to Islam, there was no slavery, male or female, and Islam introduced it. However, Islamic Law contains two kinds of injunctions.

The first are injunctions that, not existing in previous legal systems, were laid down by Islam as principles for the first time. In other words, Islam established them, such as *zakâh* and the shares of inheritance. Islamic scholars state that these are for the benefit of humankind one hundred percent. They also contain many instances of wisdom and purposes, even if people are not aware of them.

The second are injunctions that Islam did not introduce: they already existed and Islam modified them. That is, Islam was not the first to lay them down as principles; rather, they were part of the legal systems of other societies and were applied in savage form. Since it would have been contrary to human nature to abolish injunctions of this kind suddenly and completely, Islam modified them, changing them from barbaric into civilized laws.

Polygamy is one of the injunctions Islam modified. It did not introduce this as something that was non-existent. Polygamy was practiced before Islam and in a barbaric form. Islam, however, put it into civilized form. That is, Islamic law did not raise the number of possible wives from one to four but reduced the number to four from eight or nine. It introduced particular conditions that, if not met, demanded certain penalties. This is indicated in the following verse: "*Then marry from among women such as are lawful to you — two, or three, or four; but if you have reason to fear that you might not be able to treat them with equal fairness, then [only] one.*"⁶⁵

After the revelation of this verse those Companions of the Prophet who had more than four wives were ordered to choose four and divorce the rest. Ghilan ibn Umayya, for example, chose four of his ten wives and divorced the rest. And Hârith ibn Qays, who had eight wives, did the same.

The same is true for slavery. Islam did not introduce slavery if it did not exist in other societies. Rather, Islam accepted it and modified it.⁶⁶

⁶⁵ The Qur'an 4:3-4.

⁶⁶ Bediüzzaman, *Munazarât* (Istanbul: Risale-i Nur Kulliyâtı, 2002), p. 1955. Bediüzzaman Said Nursî (1878– March 23, 1960) was an Islamic thinker and the author of the Risale-i Nur Collection, a

D) Sacred laws could change in accordance with the period.

Indeed, in one age different prophets may come, and they have come. Since subsequent to the Seal of the Prophets, his Greater *Shari'ah* is sufficient for all peoples in every age, no need has remained for different laws. However, in secondary matters, the need for different schools has persisted to a degree. Just as clothes change with the change of the seasons and medicines change according to dispositions, so sacred laws change according to the ages, and their ordinances change according to the capacities of peoples. Because the secondary matters of the ordinances of the *Shari'ah* look to human circumstances; they come according to them, and are like medicine.

At the time of the early prophets, since social classes were far apart and men's characters were both somewhat coarse and violent, and their minds, primitive and close to nomadism, the laws at that time came all in different forms, appropriate to their conditions. There were even different prophets and laws in the same continent in the same century. Then, since with the coming of the Prophet of the end of time, man as though advanced from the primary to the secondary stage, and through numerous revolutions and upheavals reached a position at which all the human peoples could receive a single lesson and listen to a single teacher and act in accordance with a single law, no need remained for different laws, neither was there necessity for different teachers. But because they were not all at completely the same level and did not proceed in the same sort of social life, the schools of law became numerous. If, like students of a school of higher education, the vast majority of mankind were clothed in the same sort of social life and attained the same level, then all the schools could be united. But just as the state of the world does not permit that, so the schools of law cannot be the same.⁶⁷

E) With respect to Islamic law, especially with regard to public domain and management issues, there is much overlapping between Islamic jurisprudence and other legal systems. The last point to be examined concerns the relation of Islamic law to such systems. Some influence by the Persians (*Sasani*) can be seen especially with respect to administration.⁶⁸ For example, 'Umar was also the first state man to shape the political development of the early Islamic state. He was the first to establish the financial institution of the *dîwân* and to take the title *amîr al-mu'minîn*. He requested this from Salman al-Farisî and benefited from the system of the Sasani Empire.⁶⁹

Qur'anic commentary exceeding six thousand pages. He is commonly known as Bediuzzaman, which means "the wonder of the time."

⁶⁷ Bediuzzaman, "The Twenty-Seventh Word," *The Words* (Istanbul: Sozler Publications, 2007), pp. 512-13.

⁶⁸ Ibrahim Kafesoglu *Türk Millî Kültürü* (Istanbul: Enderun Kitâbevi, 1983), p. 34-40.

⁶⁹ 'Umar, *Encyclopedia of Islam* (Leiden: Brill, 1993); cf. Bodil Hjerrild, "Islamic Law and Sasanian Law," Christopher Toll, Jakob Skovgaard-Petersen, *Law and the Islamic World Past and Present*, (Copenhagen: Kgl. Danske Videnskabernes Selskab, 1995), pp. 49ff.

2 THE SOURCES OF INFORMATION FOR ISLAMIC LAW (REFERENCES)

First and foremost, there is no shortage of references with respect to the history of Islamic Law. In actual fact, the libraries (particularly the Süleymaniye in Istanbul, al-Maktabah al-Zâhiriyyah in Damascus and the Cairo Libraries) and the archives (especially the Prime Ministerial Archives of the Ottoman State) are the richest treasuries of the history of Islamic Law with respect to both theoretical and applied references. We will classify and mention only some important references in this book. Since most of the new and old references are mentioned in our footnotes and the bibliography in the study of each topic, it will suffice to give some general information about our references here. References for Islamic Law can be categorized into two groups: *theoretical* and *applied*.¹

2.1 Theoretical References

The theoretical references of Islamic Law are ranked as follows in their order of significance.

2.1.1 Books of Fiqh (Applied Islamic Law)

In Islamic Law these references are called *Furû' al-Fiqh*, i.e. Books of Applied Islamic Law, which are comprised of detailed rules that are taken as the basis for application. In point of fact, these references on Islamic law are also the primary quintessential references. Since the 7th century C.E., the rules of Islamic Law have been compiled by jurists known as *faqîhs* (Islamic jurists). We have the works of the very founders of the four *Madhhabs* (Schools of Islamic Law) famous in Islamic Jurisprudence, viz. *Hanafî*, *Hanbalî*, *Mâlikî* and *Shâfi'î*. With reference to the detailed information in this regard on those topics to come, we can mention as an example here the work by Imâm Shâfi'î, called *al-Umm*, consisting of eight volumes totaling 2500 pages (204/819). On the other hand, the first codification of the Hanafî *madhhab* was written by Imâm Muhammad, a student of Imâm A'zam, in six essential volumes that were first annotated by jurists in Qarakhan in a very detailed way. Their zeal was later

¹ Some sources about this subject are Imran Ahsan Khan Nyazee, *Bibliography of Islamic law: the Original Sources*, (Islamabad: Niazi Publishing House, 1995); John Makdisi and Marianne Makdisi. "Islamic Law Bibliography: Revised and Updated List of Secondary Sources." *Law Library Journal*, 87 (1995): 69–191; William B. Stern, "Bibliography of Mohammedan Law," 43, *Law Library Journal*, 16 (1950).

carried on by Muslim jurists.²

Books of Islamic Law can also be classified into two groups by those who elaborate on the topics of this law and their methods of elaboration.

2.1.1.1 *Mudallal* (Supported with Arguments) Books of Islamic Law

These books not only mention the legal rules but also detail the references to each legal case as well as the other opinions and theories on the topic at issue. Furthermore, they reach a preferred conclusion by discussing different views on disputed legal cases. The comparative cross-*Madhhabs* work called *al-Asrâr*, written by Abu Zaid Ubaydullah (430/1039) of Dabbus, which was the first city in Turkistan to profess Islam, and, again, the perfect seven-volume work on legal codifications called *Badâyi' al-Sanâyi' Fi Tartîb al-Sharâyi'* written by Abubakr Ibn Mas'ûd (578/1191) of Kashan, again a city in Turkistan, are among the most exquisite examples in this group.³

The statements in the *fiqh* books of one school concerning views held in another are not always accurate and must be viewed with caution. As a rule, greater caution is needed in regard to books that may not, strictly speaking, be called *fiqh* books, such as the work *al-Mâwardi*, than would be necessary for a work on *fiqh* proper, such as the *Hidâyah* or the *Minhâj*. Works of the latter type, which are objects of constant study and comment as well as of actual application, have remained, relatively speaking, immune from textual corruption. Moreover, it is easy to correct any corruptions that may have crept into the text by referring to the source books of the school on which they are invariably based. Works of the former type, however, have not had the benefit of these corrective agencies to the same extent.

We would like to mention here very important sources of this kind from important law schools. In the next editions of this work we may add new references if there are any contributions by scholars.

2.1.1.1.1 *Hanafite Books with Arguments on the Application of Fiqh*

We could say that Abu Hanîfa was the first author of a book which its name was the *al-Fiqh al-Akbar*;⁴ but this is about theology not Islamic law. This is a work of the

² Mustafa ibn 'Abdullah Kâtib Chelebi Haji Khalifah (1068/1657), *Kashf al-Zunûn 'an Asâmi al-Kutub wa'l-Funûn* (Beirut: Dar al-Fikr, 2007); Ahmed Akgündüz, *Mukayeseli Islam ve Osmanlı Hukuku Külliyyâtı* (A Collection of Comparative Legislation of Islam and Ottomans) (Diyarbakır: Dicle University Law School, 1986), pp. 70ff.

³ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, pp. 125, 227.

⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 264.

first rank and has been commented upon by various writers. His two famous pupils Abu Yusuf and Imâm Muhammad have written books about Islamic law.

1. *Kitâb al-Kharâj* by Ya'qub ibn Ibrahim Abu Yusuf (182/731). It is a valuable treatise on financial and political questions addressed to Caliph Harun-al-Rashid. *Adab al-Qâdhî* by Abu Yusuf discusses the duties of a *Qâdhî*.⁵

2. *Al-Mabsûṭ* by Shams-al-a'immah Abu Bakr Muhammad ibn Ahmed al-Sarakhsi (483/1090), Cairo: Matba'ah al-Sa'adah, 1323/1905, in 30 parts; a famous commentary on *al-Kâfî fî Furû' al-Fiqh* by Muhammad ibn Muhammad al-Marwazi al-Hâkim al-Shahîd (334/945). This work combines the works of Muhammad ibn al-Hasan. There are many *Mabsûṭs*, but when the word is used without any further qualification it is this work that is meant. The commentary is combined with the text. The work was dictated by the author in prison. In the preface he says that, seeing that many of his contemporaries were engaged in controversy or subtle dialectics, or subordinated legal (*fiqh*) considerations to philosophical ones, he attempts to base the legal principles on legal considerations pure and simple. The arguments used by later *fuqahâ* are almost always found in the *Mabsûṭ*.⁶

3. *Al-Muhîṭ*, known as *al-Muhîṭ al-Radhawî* or *al-Muhîṭ al-Sarakhsi* by Radhi-al-Dîn Muhammad ibn Muhammad al-Sarakhsi (544/1149), available in three different sizes. Unless it is stated otherwise, the name refers to the large size of this *Muhîṭ* in distinction from the next *Muhîṭ*. In his work the author gathered all the legal determinations (*masâil*) with their motives and meanings. He first mentions the cases of the *Mabsûṭ*, then the *Nawâdir*, then the *Al-Jâmi'*, then the *Ziyâdât*.⁷

4. *Al-Muhîṭ al-Burhânî fî al-Fiqh al-Nu'mânî* by Burhân-al-dîn Mahmud ibn Ahmad ibn al-Sadr- al-Shahid al-Bukhârî ibn Mâzah (570/1174). This *Muhîṭ* is sometimes confused with the above, which is the more standard of the two. This is a larger work than the previous, utilizing the works of Muhammad ibn al-Hasan as well as the legal decisions arrived at by later jurists (*fatâwâ* and *wâqî'ât*), such as his own father. It often provides the arguments.⁸

5. *Badâyi' al-Sanâyi' fî Tartîb al-Sharâyi'* by Alâ'-al-Dîn Abu Bakr Ibn Mas'ûd al-Kasani (or al-Kâshânî) *Malik al-Ulamâ* (587/1191), Cairo, 1327/1909. Apparently, this is based on the *Tuhfah al-Fuqahâ* by his teacher Alâ'-al-Dîn Muhammad ibn Ahmad al-Samarqandî who, according to the author, was the only jurist before him to take the trouble to arrange (*tartîb*) the legal material. The arrangement of the work is highly

⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 359.

⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 483.

⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 512.

⁸ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 511.

schematic and quotes the views of al-Shâfi'î and sometimes of Mâlik, with their arguments, mentioning the Hanafîte arguments last.⁹

6. *Al-Hidâyah* by Shaykh-al-Islâm Burhân-al-Dîn 'Ali ibn Abu Bakr al-Marghinâni (593/1196). This is a commentary on the author's own *Bidâyat al-Mubtadî* and one of the most esteemed Hanafîte compendiums. A poem states that, like the Qur'an, this work has abrogated (*naskh*) its predecessors. The work may be said to be a commentary on the *al-Jâmi' al-Saghîr* and the *Mukhtasar al-Quduri*, on which the *Bidâyah al-Mubtadî* is based. The *Hidâyah* is both a digest and a commentary. The author, commenting on each text of the original, has expounded the law on particular points by citing authorities from the most approved works by early writers on Islamic Law.

Famous Commentaries: (a) *al-Nihâyah* by his disciple Husâm-al-Dîn Husayn ibn 'Ali al-Sighnâqî (710/1310); (b) *Mi'râj al-Dirâyah* by Qiwwâm-al-Dîn Muhammad ibn al-Bukhârî, esteemed for its independence of view. This book was translated by C. Hamilton (London: W.H. Allen, 1870). al-Kâkî (749/1348) gives the opinions of the four *Imâms*, their reasons, and the old and more recent views, etc. (c) *Gâyah al-Bayân* by Amir Kâtib ibn Amir 'Umar al-Itqânî (758/1357). (d) *Al-'Inâyah* by Akmal-al-Dîn Muhammad ibn Mahmud al-Bâbartî (786/1384), esteemed in the Ottoman State as one of the best. It is an abridgement for purposes of instruction in his own larger *al-Nihâyah*. It contains useful analytical summaries. (e) *Fath al-Qâdîr* by Kamâl-al-Dîn Muhammad ibn 'Abd-al-Wâhid ibn al-Humâm (861/1456).¹⁰

2.1.1.1.2 *Shâfi'î Books with Arguments on the Application of Fiqh*

1. *Kitâb al-Umm*, by Muhammad ibn Idris al-Shâfi'î (204/819). The most important copy is a recension by al-Rabî' Abu Muhammad al-Murâdî. There is also a recension by al-Hasan al-Za'farânî, one of al-Shâfi'î's Baghdad disciples, but it has disappeared. The *Umm* is a valuable source for the study of law. It is full of *hadîths* and contains many repetitions. There are abridged recensions (*mukhtasar*) of al-Shâfi'î's teachings by al-Rabî', Abu Ya'qub al-Buwaytî, and Ismail ibn Yahya al-Muzani (264/877). The *Mukhtasar* by al-Muzani is the most widely known of them. Al-Nawawî speaks of it as one of the five most widely used books in his time, the other four being the *Muhadhdhab*,

⁹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, pp. 227, 316.

¹⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, pp. 816-17; Ahmad Sa'id Hawwa, *al-Madkhal ila Madhhab al-Imâm Ebu Hanîfa al-Nu'man* (Jeddah: Dar al-Andulus al-Khadra, 2002), pp. 353-74; Abu l-Khayr Ahmad ibn Muslih-al-Dîn Mustafa Tashkopruzadeh (968/1560), *Miftâh al-Sa'âdah wa Misbâh al-Siyâdah*, vol. II (Beirut: Dâr al-Kutub al-Ilmiyyah, 1985), pp. 236-62; Nicolas Aghnides, *Islamic Theories of Finance: With An Introduction to Islamic Law and a Bibliography* (New York: Columbia University, 1916), pp. 177-82; Shama Churun Sircar, *The Muhammadan Law: A Digest of the Law Applicable Especially to the Sunnîs of India* (Calcutta: Thacker, Spink and Co., 1873), pp. 37-48.

the *Tanbîh*, the *Wasît* and the *Wajîz*, which will be discussed later. The opinions of al-Shâfi'î cited in the *Umm* and the other recensions of his teachings in Egypt are called his recent opinions (*jadîd*) in distinction from his older views (*qadîm*) contained in recensions of his teachings in Baghdad, such as the *Kitâb al-Hujjah*.¹¹

2. *Al-Hâwi al-Kabîr* by Ab al-Hasan 'Ali ibn Muhammad al-Mâwardi (450/1058). This is an exhaustive treatise on *fiqh*. A condensation of it is the author's *al-Iqnâ*. Al-Mâwardi is said to have written the *al-Iqnâ* on the order of the caliph al-Qâdir-bi'llah in competition with al-Quduri, the Hanafite.¹²

3. *Al-Ahkâm al-Sultâniyyah* by the same Al-Mâwardi. Ed. Max Enger, Bonn, 1853. This is a justly renowned work that gives the description of an ideal state. Some of the subjects it covers are not to be found elsewhere, as the author himself points out in his conclusion. The treatment is schematic and clear-cut in many cases with respect to content, closely following al-Shâfi'î's *Umm*. The views of Abu Hanîfa and Mâlik are mentioned.¹³

4. *Nihâyah al-Matlab fi Dirâyah al-Madhab* by Abu'l-Ma'âli 'Abd-al-Mâlik ibn Abu Muhammad 'Abdullah al-Juwayni, Imâm-al-Haramain (478/1085), an extensive work in forty parts, "the like of which has not been composed in Islam."¹⁴

5. *Al-Basît* by Hujjah al-Islam Abu Hâmid Muhammad ibn Muhammad al-Gazzâlî (505/1111). This is based on the *Nihâyah al-Matlab* of his teacher Imâm-al-Haramain. *Al-Wasît al-Muhîl bi Aqtâr al-Basît* is a compendium of the former by the author himself. It is one of the five books referred to by al-Nawawî as *al-Wajîz*. It is an excellent schematic summary of all the Shâfi'îte views, independent (*aqwâl*) or deduced (*wajh*); the authors responsible for them are not mentioned. The differences from al-Muzani, Abu Hanîfa and Mâlik are indicated by letters. The best known of the commentaries on the *Wajîz* is the *Fath al-'Azîz 'ala Kitâb al-Wajîz* by Abu al-Qâsim al-Rafî'î (623/1226). *Al-Rawdah*, by al-Nawawî, is an abridgment of it.¹⁵

6. *Al-Muhadhdhab* is the well-known work by al-Shirâzi and provides arguments and difficult points. The most famous commentary on it was written by Abu Zakaria Muhiuddîn Yahya ibn Sharaf al-Nawawî (1234-1278), *al-Majmû' Sharh al-Muhadhdhab* is a comprehensive manual of Islamic law according to the Shâfi'î School.¹⁶

¹¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 347.

¹² Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 490.

¹³ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 80.

¹⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 784.

¹⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 237.

¹⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 728; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 289-332; Aghnides, *Islamic Theories of Finance*, pp. 186-89; Sircar, *The Muhammadan Law*, p. 36.

2.1.1.1.3 *Mâlikî Books with Arguments on the Application of Fiqh*

1. (*Al-Masâ'il*) *al-Mudawwanah*, a recension by Qâdhî Sahnun Abu Sa'îd ibn 'Abd-al-Salam al-Tanukhi (240/854). It consists of questions by Sahnun and answers by 'Abdurrahman ibn al-Qâsim, who was one of Mâlik's students for 20 years. As a rule, these answers repeat Mâlik's literal words, although at times they are Ibn al-Qâsim's own interpretation of what Mâlik said. The *Mudawwanah* is a revision by Ibn al-Qâsim of Asad ibn al-Furât's *Asadiyyah* when it was submitted to Ibn al-Qâsim by Sahnun, who had studied the *Asadiyyah* under Asad. Because Asad failed to incorporate the corrections of Ibn al-Qâsim as found in Sahnun's copy, the *Asadiyyah* was forgotten. After Ibn al-Qâsim's death, Sahnun incorporated *hadîths* into his copy that supported some of its views and improved its arrangement. *Mukhtalitah* is another name given to the *Mudawwanah*. The *Mudawwanah* is the greatest Mâlikîte authority.¹⁷

2. *Al-Wâdihah* by Abu Marwân 'Abd-al-Mâlik ibn Habib al-Sulami (238/852) of Spain, who studied under Ibn al-Qâsim and spread the Mâlikîte teachings in Spain. The *Wâdihah* naturally found favor in Spain.

3. *Al-Mustakhrajah min al-Asmi'ah al-Masmû'ah min Mâlik ibn Anas*, known as *Al-'Utbiyyah*, by Muhammad ibn Ahmed al-'Utbi al-Qurtubi (255/869), a student of Ibn Habib. This work superseded the *Wâdihah* and itself became an object of study and comment. The commentary on it by Muhammad ibn Ahmed ibn Rushd (520/1126) deserves mention. It is called *Kitâb al-Bayân Wa'l-Tahsil Wa'l-Sharh wa 'l-Tawjîh wa'l-Ta'lîl fa Masâ'il al-Mustakhrajah* arranged in the conventional fiqh book chapters. The author, after citing the questions and Mâlik's answers and, for example, the view of Ibn al-Qâsim, introduces his own view as "Qâdhî Muhammad ibn Rushd," supporting it by lengthy arguments. It is a valuable source-book for determining the development of the school. The *Mudawwanah*, *Asadiyyah* and *'Utbiyyah*, are called *al-Ummahât*, i. e. the mother books.¹⁸

4. *Kitâb al-Nawâdir wa al-Ziyâdât* by 'Ubayd-allah ibn 'Abdurrahman ibn Abu Zaid al-Qayrawani (386/996). It combines the previous works and collects all legal opinions for Imâm Malik, which did not exist in *Mudawwanah*.

5. *Al-Mugaddamât al-Mumahhadât li Bayân ma Aqtadathu Rusûm al-Mudawwanah min al-Ahkâm al-Shar'iyât wa al-Tahsilât al-Muhkamât li Ummahât*

¹⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 531; Abdurrahman ibn Khaldun, *Târîkh ibn Khaldun*, *Kitâb al-Ibar wa Dîwân al-Mubtada wal Khabar fî Ayyam al-Arab wal-Ajam wal-Barbar wa man Asarahum min Zawi al-Sultan al-Akbar*, vol. I (Beirut: Dar al-Kutub al-Ilmiyyah, 1992), pp. 481-82.

¹⁸ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 138; Abdurrahman ibn Khaldun, *Târîkh ibn Khaldun*, vol. I, pp. 481-82.

Masâ'iliha al-Mushkilât (Ibn Rushd) by Abu al-Walid Muhammad ibn Ahmed ibn Rushd al-Qurtubi (520/1126), grandfather of the famous philosopher ibn Rushd (Averroes). It indicates the etymology and the justification of the words and meanings of the *Mudawwanah*. Its treatment is analytical.

6. *Sharh al-Talqîn for Qâdhî Abdulwahhab al-Baghdadi* (422/1031), by Abu 'Abdullah Muhammad ibn 'Ali al-Tamimi al-Mâziri (536/1141), known as the *Imâm*. He is another famous jurist who commented on the *Mudawwanah*. Al-Mâziri distinguished himself by his generally accepted independent views (*qawl*). Ibn Yunus, al-Lakhmi, ibn Rushd and al-Mâziri are the four authorities whose opinions are mentioned, and authorship is specified by Khalil in his famous *Mukhtasar*.

7. *Al-Dhakhîrah* for Ahmad ibn Idris Shihabudîn as-Sanhaji al-Qarafi al-Mâlikî (684/1285). That is a magisterial fourteen-volume work recently published in the Emîrates that looks at Mâlikî fiqh with proofs from usûlî sources. It is like an encyclopedia of Islamic Law.¹⁹

2.1.1.1.4 Hanbalî Books with Arguments on the Application of Fiqh

1. *Al-Jâmi' al-Kabîr* Abu Bakr al-Khallal (334/945-403/1012). Al-Khallal traveled to various places searching for the juristic opinions and *fatwâs* issued by Imâm Ahmad. He gathered such a large number of *fatwâs* that he compiled a book of about twenty volumes.²⁰

2. *Al-Mughnî* by Muwaffaq-ud Dîn Abu Muhammad 'Abdullah ibn Ahmad ibn Muhammad ibn Qudamah (620/1223), a well-known Hanbalî book on *fiqh*. He compared all schools and mentioned all the arguments.²¹

3. *Al-Ahkâm al-Sultâniyyah* (political theory and rulings on government) by al-Qâdhî Abu Ya'la al-Hanbalî (458/1065).²²

4. *Al-Muharrar* by Imâm Abdus-Salam ibn 'Abdullah (652/1254), the grandfather of Imâm Ibn Taimiyya, reviewed Imâm Ahmad's *fatwâs* and wrote a book on jurisprudence.²³

5. *Majmû' al-Fatâwâ al-Kubrâ* (A Great Compilation of *Fatâwâ*) by Taqi ad-Dîn Ahmad Ibn Taimiyya (1263–1328). It is a set of thirty-six volumes on the Islamic reli-

¹⁹ Aghnides, *Islamic Theories of Finance*, pp. 190-93; Abdurrahman ibn Khaldun, *Târîkh ibn Khaldun*, vol. I, pp. 481-82.

²⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 451.

²¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 607.

²² Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 80.

²³ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 506.

gion.

6. *Zâd al-Ma'âd* by Muhammad ibn Abu Bakr ibn al-Qayyim (1292-1350).²⁴

2.1.1.1.5 Shi'î Books with Arguments on the Application of Fiqh

1. *Bashâ'ir al-Darajât fî Ulûm Âl-i Muhammad wamâ Khassahum bihi* by Abu Ja'far ibn al-Hasan al-Qummi (290). We could say that he was second founder.

2. *Sharâyi' al-Islam* by Najm-al-Dîn Ja'far ibn Muhammad al-Hilli Abu al-Qâsim (436-676/1044-1277). A commentary on it is the *Masâlik al-Afhâm* (964/1556) by Zayn-al-Dîn ibn 'Ali al-Shâmi al-'Âmilî. A French translation of the *Sharâyi'* is A. Querrey's *Droit Musûlman* (Paris, 1871). N.B.E. Baillie's *A Digest of Mohummudan Law, etc.*, Part II, 2nd ed. (London, 1887) is based on the same work. Another commentary on it is *Madârik al-Ahkâm* (1006/1597) by Muhammad ibn 'Ali al-Musawî al-'Âmilî.²⁵

2. There are four essential books by Imâmiyyah on fiqh and hadith. They are: *Al-Kâfî*, *Man lâ Yahduruhu Al-Faqîh*, *Al-Tahdhîb*, and *Al-Istibsâr*. These books have collected all narration relating to Islamic Law for *Fiqh al-Ja'farî*. Shi'î jurists say that Shi'î faqîhs have written 400 books on *Fiqh al-Imâmiyyah*, and they are preserved and summarized in these four books. These are called *al-Usûl al-Arba'ah* and, although they concern Hadîths, they have been arranged according to fiqh chapters. A) *Al-Kâfî* by Abu Ja'far Muhammad al-Kilînî al-Râzî (Thiqâ al-Islam) (329/940). B) *Man lâ Yahduruhu al-Faqîh* by Abu Ja'far Muhammad ibn Babuvayh al-Qummî (380/990). C) *Tahdhîb al-Ahkâm* by Abu Ja'far Muhammad al-Tûsî Shaykh al-Tâifah (460/1067). D) *Al-Istibsâr* by Shaykh al-Tâifah (460/1067). Al-Hurr al-'Âmilî (1104/1692) has combined all these works under the title *Vasâil al-Shî'a* in thirty volumes.²⁶

2.1.1.1.6 Zâhirî Books with Arguments on the Application of Fiqh

Al-Kitâb al-Muhallâ bi al-Âthâr by Abû Muḥammad 'Alî ibn Ahmad ibn Sa'îd ibn Hazm (994–1064). We can translate the name of this book as "The Book Ornamented with Traditions." It is a wealth of scholarship in which ibn Hazm discusses each question separately. On each question he cites the views of earlier scholars of high achievement, not restricting himself to the views of the four schools of *Fiqh* but also citing the rulings by scholars like al-Hassan al-Basri (110/728), al-Laith ibn Sa'ad (175/791), Atâ' (114/732), Sufian al-Thawrî (161/777), al-Awza'î (157/773), etc. He

²⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 4; Aghnides, *Islamic Theories of Finance*, p. 194.

²⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 65.

²⁶ Aghnides, *Islamic Theories of Finance*, p. 194.

also quotes the evidence they cite in support of their views.²⁷

2.1.1.2 *Ghair al-Mudallal* (Not Supported with Arguments) Books of Islamic Law

These books of *fiqh* narrate only legal rules and institutions or explain only the words and sentences of legal texts in order to facilitate the understanding of decisions. They either do not treat the comparison to the opinions of other jurists or detail the references of rules at all or only mention them. The legal text *al-Gurar* by Molla Khusraw (885/1480), an esteemed jurist of the era of the Muhammad the Conqueror, and the annotation thereof, *al-Durar*, which elucidates the text, the eight-volume *Hukuk-i İslâmiyye Ve Istilahat-ı Fikhiyye Kamusu* written by 'Umar Nasuhî Bilmen, a contemporary jurist, set examples for this group. On the other hand, the legal text called *Multaqâ al-Abhur*, authored by Ibrahim al-Halabi (1549) of the Imâms of Fâtih Mosque, which was studied as a textbook for centuries in Ottoman *madrasahs* (schools/universities), and the annotation of the aforementioned text, *Majma' al-Anhur*, also known as *Dâmâd*, written by Shaikh al-Islam Abdurrahman ibn al-Muhammad (1078/1667), are among the works that could be mentioned in this group.²⁸

The official – and the first – acceptance of such a book on Islamic Jurisprudence like the Legal Code of the State in the Ottoman State occurred for the aforesaid book called *Multaqâ al-Abhur* between circa 1648 and 1687. Through the *firman* of Murad IV this work, which was later translated into Turkish as well, almost became the official legal code of the Ottoman State that covered criminal law, family law and, in short, all legal issues resembling laws.²⁹

The Islamic Law sources fall into three fairly distinguishable classes: (a) the so-called texts (*matn*) or compendiums (*mukhtasars*); (b) the commentaries (*sharh*) and glosses (*hashiyah*, *taqrîr*, *ta'liq*); (c) the collections of legal opinions (*fatwâs*). The compendiums provide in a more or less general way the principles of law regarding concrete cases and are intended to serve as a basis of instruction and as a mnemonic aid. As a rule, they do not mention the arguments and do not indicate the views of

²⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 510.

²⁸ Akgündüz, *Külliyât*, pp. 75ff.; Abu Zaid Dabbusi, *Kitâb al-Asrâr*, Süleymaniye Library, Ayasofya No: 1021; Mas'ûd al-Kashani, *Badâ'iy' al-Sanâ'iy'*, vol.1 (Beirut: 1974), p. VII; Molla Khusraw, *Durar al-Hukkâm* (Istanbul: 1317), vol. I-II; Ibrahim al-Halebi, *Multaqâ al-Abhur* (Istanbul:1309); Dâmâd, *Majma' al-Anhur* (Istanbul, al-Matbaah al-Âmirah, 1331), vol. I-II; Omer Nasuhi Bilmen, *Hukuk-i İslâmiyye Ve Istilahat-ı Fikhiyye Kamusu* (A Lexicon of Islamic Legislation and Terminology of Islamic Jurisprudence), vol. I-VIII (Istanbul: Bilmen Yayınevi, 1985).

²⁹ PA (Prime Ministry Ottoman Archives), YEE-14-1540, pp. 13-14.

other schools. Because they are intended to be learnt by heart by the students, the ideal that the writers of such compendiums set for themselves is to make them as brief but as comprehensive as possible.

The *Mukhtasar of Khalil* probably came closer to this ideal than any other. Various devices are used to indicate, without stating clearly, if a certain view was held by the founder of the school (*nass*) and if it is an independent view (*qawl*) or merely an application by analogy (*wajh*, *qawl mukharraj*) of an existing view. Those responsible for a given view and the view to be preferred of the various views are also indicated. The Hanafite usage in this last respect is to cite first the view favored by the writer of the text, unless the text gives the arguments as well. In such a case, first the views and then the respective arguments are presented, with the view and argument favored given last. While no established usage has prevailed on the whole here, in some instances a fairly common understanding seems to have been reached. A thorough study of this subject would be most helpful for the proper understanding of the sources. Probably the chief distinction between a commentary and a gloss is that a gloss is sketchier and goes into questions of grammar and syntax more often and at length.

2.1.1.2.1 *Hanafi Books without Arguments about the Application of Fiqh*

1. *Kutub Zâhir al-Riwâyah, Zâhir al-Madhhab, or al-Usûl*. These are the source-books of the Hanafite School and were written by Muhammad ibn al-Hasan al-Shaybânî (187/803). According to Ibn al-Humâm, unless Muhammad indicates the contrary, the views stated in these books are those of Abu Hanîfa and Abu Yusuf, as well as his own. They are the following:

(a) *Al-Mabsût*, also called *al-Asl*. The different parts of the *Mabsût*, known as the "Book of so-and-so," were composed separately, and the name *Mabsût* (extended) was given to them when they were combined. Many commentaries were written on the *Mabsût*, among others by Shams-al-a'immah 'Abd al-'Azîz ibn Ahmed al-Halwânî (or Halwâ'i) (448/1056). The original work of al-Shaybânî was *al-Mabsût* which can be compared with *Pandectae*.³⁰

³⁰ Benjamin Jokisch, *Islamic Imperial Law: Harun-al-Rashid's Codification Project*, (Berlin: Gruyter GmbH, 2007), p. 279ff. *Pandects* is a name given to a compendium or digest of Roman law compiled by order of the emperor Justinian I in the 6th century (A.D. 530-533). These pandects were one part of the *Corpus Juris Civilis*, the body of civil law issued under Justinian I. The second and third parts were *Institutiones*, and the *Codex Constitutionum*. A fourth part, the *Novels* (or "Novellae Constitutiones"), was added later. Cf. J. E. Goudsmit, *The Pandects: A Treatise on The Roman Law and upon its Connection with Modern Legislation*, (Clark: The Lawbook Exchange, Ltd., 2005), pp. 1-4.

(b) *Al-Jâmi' al-Saghîr*. This is said to contain 1,532 propositions and is a highly esteemed work. Judges and *muftîs* were required to learn it by heart as a condition for appointment. It indicates the authorities. The arrangement and division into chapters were done later. The most well known of the many commentaries on it are those by (1) Fakhr-al-Islam al-Pazdawi (482/1089) and (2) Fakhr-al-Dîn al-Hasan ibn Mansûr al-Uzjandi Qâdhikhân (592-1195).³¹

(c) *Al-Jâmi' al-Kabîr*. It contains principles (*mutûn al-dirâyât*) and niceties in legal deduction (*latâîf al-fiqh*). Two supplements were written by Muhammad al-Hasan for this work: the *al-Ziyâdât* and the *Ziyâdât al-Ziyâdât*. These, too, were much commented upon.³²

(d) *Al-Siyar al-Saghîr wa'l-Kabîr*, the last of Muhammad's works and written after his departure from Iraq. The *Siyars* treat the subject of *Jihâd*. Many commentaries on this work were written.³³

2. *Al-Mukhtasar fi al-Fiqh*, by Abu Ja'far Muhammad al-Tahawi (321/933), in two sizes. It follows the arrangement of the *Mukhtasars al-Muzani*. Many commentaries were written on it.

3. *Al-Kafî fi Furû' al-Fiqh*, by Muhammad ibn Muhammad al-Marwazi al-Hâkim al-Shahîd (334/945). This work combines the works of Muhammad ibn al-Hasan already mentioned above, and is an authority for determining the views of al-Hanîfa and his two disciples.³⁴

4. *Al-Mukhtasar fi al-Fiqh*, by Abu al-Hasan 'Ubayd-Allah ibn al-Hasan al-Karkhi (340/951).³⁵

5. *Mukhtasar al-Quduri*, by Abu al-Husayn Ahmed ibn Muhammad al-Quduri, al-Bagdadi (428/1036). This is a compendium with a very high reputation. It is referred to as "The Book," and there are many commentaries on it.³⁶

6. *Wiqâyah al-Riwâyah fî Masâil al-Hidâyah*, by Burhân-al-Dîn (Sharî'ah) Mahmud ibn Sadr-al-Sharî'ah al-Awwal 'Ubayd-Allah al-Mahbubi (680/1281). This is a compendium based on the *Hidâyah*, with the omission of the reasons and the indication of the right views, written for his grandson, 'Ubayd-Allah Ibn Mas'ûd. *Al-Niqâyah* or *Mukhtasar al-Wiqâyah* by 'Ubayd-Allah Ibn Mas'ûd ibn Tâj-al-Sharî'ah Mahmûd ibn Sadr-al-Sharî'ah al-Thâni al-Mahbubi (747/1346). A well-known commentary on the

³¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 443.

³² Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 450.

³³ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 53.

³⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 333.

³⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 523.

³⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 520.

latter is the *Jâmi' al-Rumûz* by Shams-al-Dîn Muhammad al-Quhistânî (950/1543).³⁷

7. *Al-Mukhtâr (li al-Fatâwâ)*, by Abu al-Fa'al Majd-al-Dîn 'Ali ibn Mahmud al-Mawsili (683/1284). Another of the highly esteemed texts, *al-Ikhtiyâr*, is a commentary on it by the same author; it gives the reasons.³⁸

8. *Majma' al-Bahrayn wa Multaqâ al-Nahrayn*, by Muzaffar al-Dîn Ahmed ibn 'Ali ibn al-Sa'ati al-Bagdâdi (696/696). This is an "esteemed" compendium, based on the *Mukhtasar of al-Quduri* and the *Manzumah of al-Nasafi* (537/1142) with additions. It is extremely concise, hence easy to memorize but difficult to understand. It indicates the differences from Abu Hanîfa's disciples as well as those from al-Shâfi'î and Mâlik by some clever device such as using nominal sentences instead of verbal ones, etc.³⁹

9. *Kanz al-Daqa'iq* by Hâfîz-al-Dîn al-Nasafi (710/1310). An abridgment of his own *al-Wâfi* (modeled after the *Hidâyah* and commented upon by the author himself in the *Kâfi*). This is one of the highly esteemed texts (*mutûn mu'tabarâh*), namely the texts that are based solely on *Zâhir al-Riwâyah* sources. Famous commentaries: (a) *Tabyîn al-Haqâiq* by Fakhr-al-Dîn 'Uthmân al-Zayla'î (743/1342). This work inquires at length into the differences from al-Shâfi'î and refutes his arguments from the Hanafite standpoint. (b) *Ramz al-Haqâiq* by Abu Muhammad Mahmud ibn Ahmed al-'Ayni (855/1451). (c) *Al-Bahr al-Râiq* by Abu Hanîfa al-Thâni (the second) Zayn-al-'Âbidîn ibn Nujaym al-Misri (970/1562). One of the most highly esteemed of later works. The author briefly indicates the reasons, makes many keen inquiries (*tahrîr*) and incorporates the principles involved in new *fatwâs*. The preface contains a list of the author's sources.⁴⁰

10. *Durar al-Hukkâm*, by Muhammad ibn Farâmurz ibn 'Ali Molla Khusraw (883/1478). There is a commentary on his own *Gurar al-Ahkâm*. This book enjoyed a special status in the Ottoman State and was used in *Madrasahs*. The author displays independence of opinion. This explains why ibn 'Abidîn would not place it among the highly esteemed texts.⁴¹

11. *Multaqâ al-Abhur*, by Ibrahim ibn Muhammad al-Halabî (956/1549). This work contains the determinations by *al-Quduri*, the *Mukhtâr*, *Kanz*, *Wiqâyah*, and partly the *Majma'* and the *Hidâyah*. It indicates the views to be preferred (*asahh*). At present, it is the standard Hanafite text (*matn*). A commentary on it is the *Majma' al-Anhur*, by 'Abdurrahman ibn Muhammad Shaykhzâdeh (1078/1078). This is

³⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 806.

³⁸ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 513.

³⁹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 497.

⁴⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 434.

⁴¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, 571.

an all-round well-known commentary. It is known as *Dâmâd* and was used in *Madrasahs* in the Ottoman State.⁴²

12. *Tanwîr al-Absâr wa Jâmi' al-Bihâr* (995/1587), by Shams-al-Dîn Muhammad ibn 'Abdullah al-Gazzi al-Timurtâshi (1004/1595). This work combines the standard texts. Ibn 'Abidîn did not consider it as a highly esteemed text. The commentary *Al-Durr al-Mukhtâr* (1071/1660), by 'Alâ'-al-Dîn Muhammad ibn 'Ali al-Haskâfi (1088/1677), a *muftî* in Damascus, was condensed from his larger commentary *Khazâin al-Asrâr wa Badâyi' al-Afkâr*. That commentary is very concise. It utilizes new *fatwâs*. A commentary on this work is the *Radd al-Muhtâr* by Muhammad Amin ibn 'Abidîn (1252/1836). This work may be said to be the last word in the authoritative interpretation of Hanafite law. It shows originality in attempting to determine the status of present practical situations that are, as a rule, shunned by others. The author demonstrates a complete mastery of his subject. This book was used a great deal in the Ottoman State but less in India.⁴³

2.1.1.2.2 *Shâfi'î Books without Arguments on the Application of Fiqh*

1. *Al-Tanbîh* by Abu Ishaq ibn 'Ali al-Shirâzi (476/1083), ed. A.W.T. Juynboll, Leiden, 1879. That is a well-known compendium that may be said to have eclipsed its predecessors, even though it had a similar fate itself. It is clear and detailed. The most well-known commentary on it is *al-Muhadhdhab* by Badr-al-Dîn Muhammad al-Zarkashi (1344-91).⁴⁴

2. *Al-Taqrîb fi 'l-Fiqh or Mukhtasar Abu Shujâ'* (also called *Ghâyah al-Ikhtisâr*), by Abu Shujâ' Ahmed ibn al-Hasan al-Isfahâni (583/1187). This volume is brief, clear, and the most widespread Shâfi'îte compendium. Commentaries: a) *al-Iqnâ' fi Hall Alfâz Abu Shujâ'* by Muhammad ibn al-Khatib al-Sharbini (977/1569). b) *Fath al-Qarîb al-Mujîb ila Sharh Alfâz al-Taqrîb*, also called *al-Qawl al-Mukhtâr fi Sharh Ghâyah al-Ikhtisâr*, by Muhammad ibn al-Qâsim al-Gazzi (981/1573). It was published in French by Van den Berg, Leiden, 1895. It is elementary, mainly explaining questions of grammar and syntax, and is used by students in Java.⁴⁵

3. *Minhâj al-Tâlibîn* by Muhyi-al-din. Abu Zakariyâ 'Yahya ibn Sharaf al-Nawawi (676/1277), an improved abridgement of the *al-Muharrar* by Abu al-Qâsim 'Abd-al-karim ibn Muhammad al-Rafi'î (623/1226), a well-known work based on the works of

⁴² Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, 655.

⁴³ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, 404; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 232-62; Hawwa, *al-Madkhal ila Madhhab*, pp. 353-74; Aghnides, *Islamic Theories of Finance*, pp. 177-82.

⁴⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 395.

⁴⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 516.

al-Gazzali. It is a standard, concise, clear text of great force. Using clever terminology, it indicates the original views (*nass* or *qawl*) of al-Shâfi'î as well as the views (*wajh*, *qawl mukharraj*) deduced by his followers by analogy. *Minhâj al-Tâlibîn: A Manual of Muhammadan Law According to the School of Shâfi'î*. Translated by E.C. Howard from the French translation by L.W.C. Van Den Berg (London: W. Thacker & Co., 1914).⁴⁶

Some commentaries: a) *Tuhfat al-Mukhtâj li Sharh al-Minhâj* by ibn Hajar al-Haithami, (974/1566). b) *Mughnî al-Mukhtâj ila Ma'rifat Ma'âni Alfâz al-Minhâj* by Muhammad ibn al-Khatib al-Sharbini (977/1566). A fairly exhaustive, useful work, presenting in a concise manner most of the matter found in other commentaries. It indicates the views that have found acceptance and briefly indicates the reasons but does not go into syntax and grammar. c) *Nihâyah al-Mukhtâj ila Sharh al-Minhâj*, by Shams-al-Dîn Muhammad ibn Ahmed al-Ramli (1004/1595). This work indicates clearly the views that have been endorsed by the Shâfi'îte School. By *qâlâ* (they two said) he means the "two Imâms," namely al-Rafl'î and al-Nawawi, by *al-Shârih* (the commentator) he means Jalâl-al-Dîn al-Mahalli, and by al-Shaykh Zakariyâ' al-Ansari. The *Muharrar* and the *Minhâj* with its two commentaries, the *Nihâyah* and the *Minhâj* are considered to be the Law books of the Shâfi'îte School."

4. *Manhaj al-Tullâb* by Abu Yahya Zakariyâ ibn Muhammad al-Ansâri (926/1520). An abridgement of the *Minhâj*, which itself became a classic and is used today in instruction. A well-known commentary on it is the *Fath al-Wahhâb* by the author himself. Glosses by Sulayman al-Bajirmi (1221/1806).⁴⁷

5. *Asnâ al-Matâlib* by the same Zakariyâ al-Ansari. That is a commentary on the *Rawd al-Tâlib* by Sharaf-al-Dîn Ismail ibn Abu Bakr ibn al-Muqri (837/1433). It was printed with glosses by Shihâb-al-Dîn ibn Ahmed al-Ramli (957/1550). It is very much like the *Mughnî*, although not quite so exhaustive.

6. *Qurrah al-'Ayn* (982/1574), by Zayn-al-Dîn al-Malîbârî. A commentary on it by the author himself is the *Fath al-Mu'în*. Glosses on it in *I'ânah al-Tâlibîn* by Sayyid Bekri Abu Bekr Shatti (1302/1885), a professor in Mecca, giving the recent *fatwâs*. The works in this group are used a great deal in East Africa and the West and East Indies.⁴⁸

2.1.1.2.3 *Mâlikî Books without Arguments on the Application of Fiqh*

1. *Tahdhîb* by Abu Sa'îd al-Barâda'î (317/929). This work is a condensation of the

⁴⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 698.

⁴⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 224.

⁴⁸ Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 289-332; Aghnides, *Islamic Theories of Finance*, pp. 186-89.

Mudawwanah and the *Mukhtalith* that found great favor with the jurists of *Ifriqiyyah* and superseded its predecessors.⁴⁹

2. *Al-Risâlah* by ‘Ubayd-Allah ibn ‘Abdurrahman ibn Abu Zaid al-Qayrawani (386/996). It is a clear, brief compendium – said to be the first in the Mâlikîte school to cover catechism questions as well and meant to be a guide for the laity. It is a compendium of great authority that has been copied and commented upon more than any other. The author also wrote a *Mukhtasar*, where he abridged the *Mudawwanah* and the *Mukhtalith*.⁵⁰

3. *Jâmi‘ al-Ummahât (Mukhtasar)* by Abu ‘Amr ‘Uthmân ibn ‘Umar ibn al-Hâjib (646/1248). This is a compendium that combines all the Mâlikîte views and was much read in the Maghreb in the days of Ibn Khaldun.

4. *Al-Mukhtasar* by Dhiyâ al-Dîn Abu al-Safâ Khalil ibn Ishaq al-Jundi al-Misri (767/1366). This is the most famous compendium of the Mâlikîte School, and since being written virtually the most authoritative summing-up of the Mâlikîte doctrines. Perhaps no compendium has found such a favorable reception as this. It is said to contain 70,000 explicit and as many implicit legal determinations. It is an attempt to include in the briefest possible compass the accepted teachings of the school on the minutest details, the holders of the opinions and the unsettled points being hinted at by a clever use of words as explained in the preface. Probably here lies the secret of its success despite the fact that the work is extremely complicated and absolutely defies understanding. A French translation of the *Mukhtasar*, with explanatory phrases inserted into the text, by Perron, in *Exploration scientifique de l’Algérie*, vols. 10-16 (Paris, 1848-52). *Mâlikî law* (The *Mukhtasar* of Sidi Khalil) has been translated by F.H. Ruxton (London: Luzac & Co., 1916).

Some Commentaries: (a) *Fath al-Jalîl*, by Muhammad ibn Ibrahim al-Tatâi (942/1535). (b) By Abu ‘Abdullah Muhammad al-Kharashi (1101/1690), with glosses by ‘Ali al-‘Adawi. This is a very well-known commentary. (c) By Ahmed ibn Muhammad al-Dardir (1201/1787). Glosses on it have been written by Muhammad ibn ‘Arafah al-Dasuqi. Both the commentary and the glosses are very highly esteemed.

5. *Tabsirah al-Hukkâm fi Usûl al-Aqdiyyah wa Manâhij al-Ahkâm* by Ibrahim ibn ‘Ali ibn Farhûn al-Andalusi (799/1397). Formerly used a great deal and intended for judges especially.⁵¹

6. *Tuhfah al-Hukkâm fi Nukat al-‘Uqud wa’l-Ahkâm* by Abu Bakr Muhammad ibn Muhammad ibn ‘Asim (829/1426) of Granada. A celebrated compendium in *rajaz*

⁴⁹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 414.

⁵⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 619.

⁵¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 295.

version. It is brief and clear.⁵²

7. *Aqrab al-Masâlik li Madhhab al-Imâm Mâlik* by Abu al-Barakât Ahmed ibn Muhammad al-Dardir al-‘Adawi al-Azhari (1201/1787). This is an abridgment of the *Mukhtasar* of Khalil. Though not quite as rich in details as the latter, it is remarkably clear for a Mâlikîte compendium. Where Khalil indicates two views, al-Dardir often gives only the one he prefers. This work and the author’s and al-Kharashi’s commentaries on Khalil are used by students in the Azhar.⁵³

2.1.1.2.4 *Hanbalî Books without Arguments on the Application of Fiqh*

1. *Mukhtasar al-Khiraqî* by Abu al-Qasim ‘Umar ibn Husain ibn ‘Abdullah al-Khiraqî (334/945). Abu al-Qasim al-Khiraqî summarized the book compiled by al-Khallal in a book called *Mukhtasar al-Khiraqî* (al-Khiraqî’s Compendium). This book was well received and captured the attention of the Hanbalî jurists who wrote more than 300 books explaining al-Khiraqî’s book and commenting on it. The best and most well-known among those 300 was *The Mukhtasar* by al-Khiraqî, a tenth-century work on Islamic jurisprudence, translated by Anas Khalid (New York: New York University, 1992). *Al-Mughnî*, by Shaikh al-Islam ibn Qudamah al-Maqdesî (630/1233). It is an explanation of *Mukhtasar al-Khiraqî*.⁵⁴

2. *Al-Muqni’* by Shaikh al-Islam Muwaffaquddîn ibn Qudamah al-Maqdesî (630/1233). *Al-Sharh al-Kabîr*, by Shamsuddîn Abdurrahman ibn Qudamah, his grandson (681/1282). It is an explanation of *al-Muqni’* by the grandfather. It cites all the legal arguments and different opinions of the Law Schools. We should not forget *Al-Insâf fî Ma’rifah al-Râjih min al-Khilâf*, by Alâ’addîn Ali al-Mardawî (885/1480).⁵⁵

3. *Al-Furû’* by ibn Muflîh (763/1362). *Tashîh al-Furû’* (commentary on *al-Furû’*), by Abu al-Hasan al-Mawardi al-Hanbalî (875/1470).

4. *Ghâyah al-Muntahâ* by Shaikh Mir’î ibn Yusuf al-Karmi (1033/1624), printed with the following explanation. *Matâlib Uli al-Nuhâ* (explanation of *Ghâyah al-Muntahâ*) by Shaikh Mustafa al-Suyûti al-Rahbani (1243/1827).⁵⁶

5. *Al-Intisâr fî al-Masâ’il al-Kibâr* by Abu Al-Khattâb Mahfûz al-Hanbalî (510/1116).

⁵² Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 313.

⁵³ Aghnides, *Islamic Theories of Finance*, pp. 190-93.

⁵⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 516.

⁵⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 562.

⁵⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 240.

2.1.1.2.5 *Shi'î Books without Arguments on the Application of Fiqh*

1. *Majmû' al-Fiqh*, attributed to Zaid ibn 'Ali (122/740), a Zaidî Shi'îte work, based on Iraqi teachings.

2. *Tadhkirah al-Fuqahâ* by al-Hasan ibn Yusuf al-Hillî (726/1326). This is a good compendium on the Ja'farî school.⁵⁷

2.1.2 *Books of Usûl al-Fiqh (Principles of Islamic Jurisprudence)*

The science of law was separated into two branches in Islamic Law. *The first* is known as the Science of *Fiqh* (Islamic Law) or *Furû' al-Fiqh*; some works on this have been mentioned above. *The second* is the Science of *Usûl al-Fiqh*. *Usûl* is the plural of *asl*, which means foundation, basis and principle. On the other hand, *fiqh* signifies, as is well known, Islamic Law. In this case, the apparent definition suggested by the name is this: the science that explains the references, essentials and general principles of law is called *Usûl al-Fiqh*. Islamic jurists define this science as theoretical legal information and principles that ensure that one learns and deduces the *Sharî'ah* decrees regarding applied (practical) issues from various evidences (sources) of it. In fact, works on *Usûl al-Fiqh* are inclusive of essentials and principles that enable *Mujtahid* (Expounder of the Holy Qur'an and *Sunnah*) jurists to deduce legal decrees from the sources. The definition of the Science of Law, the branches and objectives of it, the sources of Islamic Law, the quintessential origin of law, the types of legal decrees, personages and their proficiency, *Ijtihâd* (interpretation), contractual theory and similar theoretical issues form the basic study fields of these works. For instance, it is possible to find detailed information on competence and the types of competence in books on Islamic jurisprudence. One is to refer to books of *Usûl al-Fiqh* to get detailed information.

The first jurist to establish the theoretical principles of law was Imâm Shâfi'î, the author of the work called *Risâlah* (Treatise). We could mention some important examples of this methodology.⁵⁸

Books on *Usûl al-Fiqh* (Principles of Islamic Jurisprudence) were written according to three separate methods in the history of Islamic law:

⁵⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 329.

⁵⁸ Tashkopruzâdah, *Miftâh al-Sa'âdah*, vol. 2, pp. 183-84; Pasha, *İslâm Hukuku Nazariyatı Hakkında Bir Etüd* (A Study on the Theory of Islamic Law), trans. Baha Arkan, vol. I (Ankara 1956), vol. I pp. 115ff.; Sa'd-al-Dîn Mas'ud ibn 'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. I, (Beirut: Dar al-Arqam, d.n) pp. 6-7; al-Zarkashî, Bedruddîn Muhammad, *al-Bahr al-Muhît Fî Usûl al-Fiqh*, vol. I (Kuwait: Ministry of Awqâf, 1988), pp. 10-11, 15-20.

2.1.2.1 Books on *Usûl al-Fiqh* according to the Hanafî (*Manhaj al-Fuqahâ*) Method

These are the works on *Usûl al-Fiqh* that were written according to the Hanafî method (or method of jurisprudence), written in an inductive and experimental method (*istiqrâ*) in which the theoretical rules of law were explicated through practical judgments and issues. The purpose was to establish those legal views of eminent jurists on legal bases and to show the links between them. The following could be mentioned as examples of the works that were written in this method:

1. *Al-Fusûl fi 'l-Usûl* by Ahmad ibn 'Ali al-Râzî al-Jassâs (370/980). This is first and the most important book on *Usûl al-Fuqahâ*. It is the primary source for the next foundational books.

2. *Taqwîm al-Adillah* by Abu Zaid 'Abdullah ibn 'Umar al-Dabbûsi (430/1039), the Hanafîte. This is the best of the works written by the earliest writers. I edited this work as my master's thesis.⁵⁹

3. *Qawâ'id al-Wusûl ila Ma'rifah al-Usûl or Usûl al-Pazdawi* by Fakhr-al-Islam 'Ali ibn Muhammad al-Pazdawi (482/1089), the Hanafîte. This is a work of classic reputation among Hanafîtes. It gives the arguments at length, although the style is difficult in parts. *Commentaries*: (a) *Kashf al-Asrâr* by 'Abd-al-'Azîz ibn Ahmed al-Bukhârî (730/1330). This was the largest, most profitable and clearest commentary. With its text it is indispensable for critical research into the history of *Usûl-al-Fiqh*. (b) *al-Taqrîr* by Akmal-al-Dîn Muhammad ibn Mahmud al-Misri al-Bâbarti (786/1384), the Hanafîte.⁶⁰ Later Hanafîte works are based chiefly on these two.

4. *Kitâb al-Usûl* by Shams-al-a'imma Abu Bakr Muhammad ibn Ahmed al-Sarakhsi (483/1090). It is a valuable source.

5. *Al-Muntakhab fi Usûl-al-Madhhab*, known as *al-Muntakhab al-Husâmi*, by Husâm-al-dîn Muhammad ibn Muhammad al-Akhsikati (644/1246). A text free of superfluous matter and well arranged with its divisions (*fusûl*) indicated and containing nice points; therefore very much sought after.⁶¹

6. *Manâr al-Anwâr* by Abu al-Barakât 'Abdullah ibn Abu Hâfiz-al-Dîn al-Nasafi (720/1320), the Hanafîte. An esteemed compendium, the most used of the author's works. Numerous commentaries were written on it. The most widely known of these is the *Sharh al-Manâr* by 'Abd-al-Latîf ibn 'Abd-al-'Azîz ibn Firishtah ibn al-Malak (830/1427).⁶²

⁵⁹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 380.

⁶⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 145.

⁶¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 680.

⁶² Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 662.

7. *Majâmi' al-Haqâ'iq*, by Abu Sa'id Muhammad al-Khâdimi (1200/1786), with his own commentary on it, the *Manafi' al-Daqâ'iq*. That is one of the works on *usûl-al-fiqh* that was used in *Madrasahs* in Ottoman State. Unquestionably the most methodical and complete of textbooks (classics) that served as references to *Majalla*.⁶³

2.1.2.2 Books of *Usûl al-Fiqh* according to the Method of Theologians (*Manhaj al-Mutakallimîn*)

The second method is known as the method of *theologians* (*Manhaj al-mutakallimîn* = *Manhaj al-Shâfi'î*), the quintessence of which is as follows: these jurists studied the rules of the science of *Usûl al-Fiqh* (Methods of Islamic Jurisprudence) within the framework of the principles of logic and only theoretically. In their opinion, the relations between the established theoretical rules and practical issues were of secondary importance. In this sense, the first jurist to establish the theoretical principles of law was Imâm Shâfi'î, the author of *Risâlah* (Treatise). We could mention some important examples of this methodology.

1. *Risâlah* by Muhammad ibn Idris al-Shâfi'î (204/819). This is the recension by al-Rabi' ibn Sulayman al-Murâdi. Said to be the first work in *usûl al-fiqh*. *Risâlah* represents the transition stage in the distinction of this science from *fiqh*. In many parts it reads like a Shâfi'îte work on *fiqh*. It is a most valuable source.

2. *Al-Taqrîb wa al-Irshâd* by Abu Bakr Muhammad al-Bâqillânî (403/1012). Imam al-Haramain has abridged this book (*Kitâb al-Talkhîs*).

3. *Al-Mu'tamad* by Abu al-Husayn Muhammad ibn 'Ali al-Basri (436/1044), the Mu'tazilîte. A large work used as a basis by later writers. The *Mu'tamad* is a commentary on the *Umdah* by 'Abd-al-Jabbâr ibn Ahmed al-Asadâbâdi Qâdhî al-Qudhât (415/1024), chief of the Mu'tazilîtes but Shâfi'îte with respect to *fiqh*.⁶⁴

4. *Al-Burhân* by Abu al-Ma'ali 'Abd-al-Mâlik ibn 'Abdullah al-Juwayni Imâm al-Haramain (478/1085) the Shâfi'îte. It shows independence with respect to view. The style is very complicated. The work, although by a Shâfi'îte, was commented upon by Mâlikîtes such as 'Abdullah al-Mâziri and Abu al-Hasan al-Anbârî.⁶⁵

5. *Al-Waraqât* also by Imâm al-Haramain. It is a small compendium intended for beginners. This work was received quite well by the Shâfi'îtes and was commented upon by many (also by Hanafîtes), including Jalâl-al-Dîn Muhammad ibn Abu al-Mahalli (864/1459), with glosses called *Qurrah al-'Ayn* (953/1546) by Muhammad ibn

⁶³ Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. I, pp. 163-72; Hawwa, *al-Madkhal ila Madhhab*, pp. 343-52; Aghnides, *Islamic Theories of Finance*, pp. 173-77.

⁶⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 594.

⁶⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 235.

Muhammad al-Khattâb the Mâlikîte.

6. *Qawâ'id al-Adillah* by Abu Al-Muzaffar ibn al-Sam'ânî (489/1096). Beirut: Muassasah al-Risalah, 1996.

7. *Al-Mustasfâ* by Abu Hâmid Muhammad ibn Muhammad al-Gazzâli (505/1111) the Shâfi'îte. This is a valuable work used as a basis for later compilations. It is original in arrangement and looks at the arguments. The *Burhân* and the *Mustasfâ* on the one hand and the *'Umdah* and the *Mu'tamad* on the other are the four best basic works on *usûl al-fiqh* written from a theological (*mutakallim*) standpoint, namely, in a purely speculative way without reference to the applications of the principles in the field of *fiqh*. There is another book for Imam, which is *Al-Mankhûl*.

8. *Kitâb al-Wâdhih* by Abu al-Wafâ Ali ibn Aqîl al-Hanbalî (513/1119).

9. *Al-Mahsûl*, by Fakhr-al-Dîn Muhammad ibn 'Umar al-Râzi ibn al-Khatib (606/1209), the Shâfi'îte. A condensation of the four works cited above, especially the *Mustasfâ* and the *Mu'tamad*, whereby he literally transfers whole pages. *Abridgments*: (a) *al-Tahsîl* by Siraj-al-Dîn Abu al-Thânâ' Mahmud ibn Abu Bakr al-Urmawî (682/1283), the Shâfi'îte. The author abridged the *Tahsîl* from the *Mahsûl* "in order to supply" the great demand for abridgments, and the *Tahsîl* was widely used. (b) *al-Hâsil min al-Mahsûl* by al-Qâdhî Tâj-al-Dîn Muhammad ibn Husain al-Urmawî. This is an abridgment of the *Mahsûl* (by about one-tenth) with respect to words rather than meaning, as the author claims. (c) *Minhâj al-Wusûl ila 'Ilm al-Usûl* by 'Abdullah ibn 'Umar al-Baydhâwî (685/1286). (d) *Tanqîh al-Fusûl fi al-Usûl* by Shihâb-al-Dîn Ahmed ibn Idris al-Qarafi (684/1285), the Mâlikîte. This is based on the *Mahsûl* and the *Ifâdah* by al-Qâdhî 'Abd-al-wahhâb, the Mâlikîte. It is favored by beginners and much commented upon.⁶⁶

10. *Ihkâm al-Ahkâm* by Abu al-Husayn 'Ali ibn Sayf-al-Dîn al-Âmidî (631/1233), the Shâfi'îte. A condensation of the four basic works cited. The author indulges in argumentation (*tahqîq*) and illustrations from the applications (*tafrî'*). An abridgment of the *Ihkâm* is the *Muntahâ al-Sûl wa'l-Amal fi 'Ilm al-Usûl wa'l-Jadal* by Jamâl-al-Dîn Abu 'Amr 'Uthmân ibn 'Umar, ibn al-Hâjib (646/1248), the Mâlikîte. (b) *Mukhtasar al-Muntahâ* or *Mukhtasar ibn al-Hâjib* by the same. This was abridged from the former. This second abridgment was very popular and was annotated by both Mâlikîtes and Shâfi'îtes.⁶⁷

11. *Al-Bahr al-Muhîl fi Usûl al-Fiqh* by Badr al-Dîn Muhammad al-Zarkashî (794/1391). This is truly an excellent book; we could call it the Encyclopedia of *Usûl al-*

⁶⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 508.

⁶⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 78.

Fiqh. It was published in six volumes (Kuwait, Ministry of Awqâf, 1992).⁶⁸

12. *Rawdhah al-Nâzir wa Jannah al-Manâzir fi Usûl al-Fiqh alâ Madhhab al-Imâm Ahmad ibn Hanbal* by ‘Abdullah ibn Ahmad ibn Qudâmah al-Maqdisî (620/1223). There is a major commentary on this work, *Ithâf Zawil-Basâir* by Abdulkarim al-Namlah, published in eight volumes.⁶⁹

2.1.2.3 Books on *Usûl al-Fiqh* that Combine Both Methods

The third method was a mixed method, bearing the features of both previous ones. The works by contemporary authors on the issue stated are still written according to this method as well. Apart from the works on this issue by Haydar Effendi the Great (1321/1903), Ismail Hakki of İzmir and Sayyid Bey, the work *A Study on the Theory of Islamic Law* written by Sava Pasha, a Christian, who was a minister in the Ottoman State, is one of the contemporary works that merits mention.⁷⁰ There are many works for contemporary jurist from this kind, like Abdulkarim Zaidan, Abu Zahra and al-Dhahabî.

Some important examples of this methodology:

1. *Badî‘ al-Nizâm* by Muzaffar-al-Dîn ‘Abdullah ibn ‘Ali ibn al-Sâ‘âtî (694/1294), the Hanafîte. An “elegant compendium” condensing the works of al-Amidi, and al-Pazdawi ibn Khaldun says that the leading *fuqahâ* of his time used to read it and that many commentaries were written on it.⁷¹

2. *Al-Tawdhîh li Hall Ghawâmidh al-Tanqîh* a commentary, by ‘Ubayd-Allah ibn Mas‘ûd ibn Tâj-al-Sharî‘ah ibn Sadr-al-Sharî‘ah al-Awwal al-Mahbubi (747/1346), the Hanafîte, on his own compendium called *Tanqîh al-Usûl*. It is an elegant text of classical fame, based primarily on the *Mahsûl* by ibn al-Hâjib and especially the *Usûl* of al-Pazdawi. It is an able schematic arrangement of those works. The author claims priority for his arrangement. The best of its commentaries is the *al-Talwîh li Kashf Haqâ‘iq al-Tanqîh* by Sa‘d-al-Dîn Mas‘ud ibn ‘Umar al-Taftâzani (792/1390).⁷²

3. *Jam‘ al-Jawâmi‘* by Tâj-al-Dîn ‘Abd-al-Wahhâb ibn al-Subki (771/1369), the Shâfi‘îte. A very comprehensive compendium of great reputation collected from two

⁶⁸ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 224.

⁶⁹ Tashkopruzadeh, *Miftâh al-Sa‘âdah*, vol. II, pp. 170-71; Aghnides, *Islamic Theories of Finance*, pp. 173-77.

⁷⁰ Tashkopruzadeh, *Miftâh al-Sa‘âdah*, vol. II, pp. 163-72; Atay Hüseyin, *İslam Hukuk Felsefesi* (Ankara: The Faculty of Theology, 1973), pp. 75-147; Akgündüz, *Külliyât*, pp. 63-70; Pasha, *İslâm Hukuku Nazariyatı Hakkında Bir Etüd*, 1/115ff.

⁷¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 231.

⁷² Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 40.

works that contain the cream of the author's commentaries on the *Minhâj* and the *Mukhtasar* by ibn al-Hâjib. That is a thorough commentary by Jalâl-al-Dîn al-Mahalli (864/1459). It is one of the textbooks used at al-Azhar.⁷³

4. *Al-Tahrîr* by Muhammad ibn 'Abd-al-wâhid ibn al-Humâm al-Siwasi (861/1456) the Hanafîte. This book treats both Hanafîte and Shaliite views with arguments. Its style is complicated. Commentary: *al-Taqrîr wa'l-Tahbîr*, by his student Muhammad ibn Muhammad ibn Amir al-Hâjj al-HalAbu (879/1474).⁷⁴

5. *Mirqât al-Wusûl fi 'Ilm al-Usûl* by Muhammad ibn Farâmurz Molla Khusraw (885/1480), the Hanafîte. Commentary: *Mir'ât al-Usûl* by the author himself. An elegant commentary containing the early views with original additions; the names of fourteen works on *Usûl-al-Fiqh* are given in the introduction. Both works were used in the *madrasahs* in the Ottoman State. Glosses by Mawla Hafid Efendi (1098/1686) and notes by Sulayman al-Izmiri (1102/1690).⁷⁵

6. *Fusûl al-Badâyi'* by Molla Fanari (834/1430), Qâdhî of Bursa, was actually compiled in the same method.⁷⁶

7. *Irshâd al-Fuhûl* by Muhammad ibn 'Ali ibn Muhammad al-Shawkani (1255/1839). A modern topical summary exposition of the views held by jurists of different schools, with arguments. The author indicates the views that merit preference, showing some independence of opinion.

8. *Al-Muwâfaqât fi Usûl al-Shari'ah* by Abu Ishaq Ibrahim al-Shâtibî (790/1388), which has been published many times. This book is an excellent book on *Usûl al-Fiqh* and the philosophy of Islamic law.

9. *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn* by Shamsuddîn Muhammad ibn al-Qayyim al-Jawziyya (751/1350). This is a unique book on the principles of *usûl al-fiqh* and the philosophy behind it.⁷⁷ He has given very important information on the developments of Islamic Law. This book has been published many times. He was among the second founders of the Hanbalî *Madhhab*.

2.1.3 Books on Hadîths (Traditions of Prophet Muhammad)

Another important reference for Islamic Law that developed under the influence

⁷³ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 467.

⁷⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 308.

⁷⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 539.

⁷⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 248.

⁷⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 154; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 163-72; Hawwa, *al-Madkhal ila Madhhab al-Imâm Ebu Hanîfa al-Nu'man*, pp. 343-52; Aghnides, *Islamic Theories of Finance*, pp. 173-77.

of Islam are the books of the Traditions and Interpretations that were written to explicate the two essential sources of the Islamic Law, viz. the Holy Qur'an and the Traditions of Prophet Muhammad. Books on Traditions study the words and acts of Prophet Muhammad from all aspects, including the legal one. For instance, the twenty-volume '*Umdah al-Qâri*', which was written by Badruddîn 'Ayni (855/1451) from the city of Ayntâb and one of the leading scholars at Azhar University during the the Mamlukid period, as an exegesis to the *Hadîth* book called *Bukhârî* has also served as a reference for jurists.⁷⁸

2.1.3.1 Some Books of Tradition (*Hadîth*)

1. *Al-Muwatta'* by Abu 'Abdullah Mâlik ibn Anas (179/795). There are about sixteen recensions, Yahya's being considered the standard. The *Muwatta'* is said to be the first compilation of *hadîths*, although there is some disagreement here. It is, properly speaking, a work of law, with the *hadîths* in it invoked in support of the author's views. It contains many *hadîths* of the *mursal* and *mungati* types. It is reported that al-Shâfi'î said that the *Muwatta'* is the most reliable book after the Qur'an.⁷⁹

2. *Musnad al-Imâm Ahmad* by Ahmed ibn Muhammad ibn Hanbal (241/855). This is the most famous collection of the *musnad* type, i.e. a collection where *hadîths* are transmitted, e.g. by the same Companion, are classified together regardless of content. The work is said to contain about 30,000 *hadîths*.⁸⁰

3. *Al-Jâmi' al-Sahîh*, known as *Sahîh al-Bukhârî* by Abu 'Abdullah Muhammad ibn Ismail al-Bukhârî (256/869). This work belongs to the type called *musannaf*, i.e., a collection of *hadîths* arranged in chapters according to content. It is the first of the six well-known *hadîth* collections considered to be reliable (*Sahîh*) and canonical. The work is said to contain 9,000 *hadîths*, 2,800 of which are repetitions.

We should mention here three commentaries: (a) *Fath al-Bâri* by Abu ibn 'Alî ibn Hajar al-Asqalânî (852/1448) the Shâfi'îte, with an introduction. It is well known and is one of the largest commentaries on the work. (b) '*Umdah al-Qâri* by Badr-al-Dîn Abu Muhammad Mahmud ibn Ahmed al-'Ayni (855/1451) the Hanafîte. It was based largely on the former, with additional material. (c) *Irshâd al-Sârî li Sharh Sahîh al-Bukhârî* by Shihâb-al-Dîn Ahmed ibn Muhammad al-Khatib al-Qastallani (923/1517) the Shâfi'îte, with an introduction to '*ilm al-hadîth* and al-Bukhârî.⁸¹

⁷⁸ Mahmud 'Aynî, *Umdah al-Qâri*, (Beirut: Dâr al-Fikr, 1998), vol. I-XVI.

⁷⁹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 724.

⁸⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 555.

⁸¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 427.

4. *Al-Jâmi' al-Sahîh* by Abu al-Husain Muslim ibn al-Hajjaj al-Nisaburi (261/874) the Shâfi'îte. This is the second of the "Six Books." This work found special favor among the Muslims of the Maghreb (West), some of whom went so far as to place it above the *Sahîh* of al-Bukhârî. *Al-Minhâj fi Sharh Muslim ibn al-Hajjâj*, by Yahya ibn Sharaf al-Nawawi (676/1277) the Shâfi'îte, with an introduction to *'ilm al-hadîth*.⁸²

5. *Sunan Abu Dâwud* by Abu Dawud Sulayman ibn al-Ash'ath al-Sijistânî (275/888), the Shâfi'îte. This is a *hadîth* collection of the *Sunan* class.⁸³

6. *Al-Jâmi' al-Sahîh* also called *Sunan al-Tirmidhi*, by Abu 'Isa Muhammad ibn 'Isa al-Tirmidhi (279/892) the Shâfi'îte.⁸⁴

7. *Sunan Ibn Mâjah* by Abu Muhammad ibn Yazid Ibn Mâjah al-Qazwîni (273/886). Also this is one of the "Six Books."⁸⁵

8. *Jam' al-Jawâmi'* by Jalâl-al-Dîn 'Abdurrahman ibn Abu Bakr al-Suyûtî (911/1277). This work combines the Six Books, several *Musnads* and others, and is intended by the author to exhaust the entire field of *hadîths*. The author abridged it in his *al-Jâmi' al-Saghîr*, which he supplemented with the *Zawâ'id*. A compilation and arrangement of all the three is the *Kanz al-'Ummâl fi Sunan al-Aqwâl wa al-Af'âl* by 'Ali ibn Husâm-al-Dîn al-Muttaqi (975/1567) the Indian. According to the numbering in the margin, it contains 46,681 *hadîths* in the form of books (*Kitâb*) (in the conventional manner of the *fiqh* books), arranged alphabetically. We could say that this is probably the easiest of the references.⁸⁶

2.1.3.2 The Books of *Hadîth* on Legal Rules (*Kutub al-Ahkâm*)

1. *Nayl al-Awtâr* by Shawkânî (1250/1832), a Zaidî Shi'îte author, using Sunnî materials.

2. *I'lâ' al-Sunan* by Mawlânâ Zafar Ahmad al-'Uthmânî al-Tahânawî (1394/1974). This is a *hadîth* codification for the Hanafî school.

3. *Bulûgh al-Marâm min Adillah al-Ahkâm* by Ahmad ibn Hajar al-'Asqalânî (852/1448). This is the work of a very important Shâfi'î scholar, who arranged all *hadîths* according to *fiqh* subjects. The most important commentary on this book is *Subul al-Salâm* by Muhammad ibn Ismail al-Kahlânî (1182/1768).⁸⁷

⁸² Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 438.

⁸³ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 46.

⁸⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 441.

⁸⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 45.

⁸⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 468.

⁸⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 243.

4. *Nasb al-Râyah li Ahâdîth al-Hidâyah* by Jamâluddîn ‘Abdullah al-Zayla‘î (762/1360). This is a reference book for all *hadîths* that was used in *al-Hidâyah* for al-Marghinânî. This is a manual for all Hanafî scholars.⁸⁸

5. *Mishkât al-Masâbih* is a new and augmented edition of *Masâbih* of al-Farra al-Baghawi by Shaykh Wali al-Dîn Abu ‘Abdullah Muhammad ibn ‘Abdullah al-Khatib (737/1336).⁸⁹

2.1.3.3 Some Books on the Science of Tradition (*Usûl al-Hadîth*)

1. (*Ma‘rifah*) ‘*Ulûm al-Hadîth*, also called *Funûn al-Hadîth*, *Muqaddimah ibn al-Salâh and Usûl al-Hadîth*, by Abu ‘Amr ‘Uthmân ibn ‘Abdurrahman ibn al-Salâh (643/1245), the Shâfi‘îte. This is the first work on the subject to achieve classical fame. It contains 65 topics (*naw*).⁹⁰

2. *Al-Kifâyah fi ‘Ilm al-Riwâyah*, by Ahmad ibn ‘Ali al-Khatib al-Baghdadi (1002-1071). It is one of the earliest works.

3. *Al-Taqrîb wa’l-Taysîr ila Ma‘rifat Sunan al-Bashîr al-Nadhîr*, by Yahya ibn Sharaf al-Nawawi (676/1277). It is a second abridgment of a first abridgment of that work by the same author called *Kitâb al-Irshâd li-Ma‘rifah Hadîth Khayr al-‘Ibâd*.⁹¹

4. *Tadrîb al-Râwî Sharh Taqrîb al-Nawawi* by Jalal-al-Dîn ‘Abdurrahman ibn Abu Bakr al-Suyûti (911/1277). The work is also intended as a commentary on the works of ibn al-Salâh and others. It is replete with information.⁹²

5. *Nukhbah al-Fikar fi Istilâh Ahl al-Athar* by Ahmed ibn ‘Ali ibn Hajar (852/1448), with a commentary by the same author.⁹³

6. *Al-Bâ‘ith al-Hathîth Sharh Ihktisâr ‘Ulûm al-Hadîth*, by Ismail ibn Kathir (1301–1373).

7. *Qawa‘id al-Tahdîth min Funûn Mustalah al-Hadîth* by Muhammad Jamaluddîn al-Qasimi. This is a contemporary and useful book.

8. ‘*Ulûm al-Hadîth wa Mustalahuhû* by Subhi Sâlih. This is a very important manual, summarizing previous works well.

⁸⁸ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 759.

⁸⁹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 569; Hawwa, *al-Madkhal ila Madhhab al-Imâm Ebu Hanîfa al-Nu‘man*, pp. 375-83; Aghnides, *Islamic Theories of Finance*, pp. 169-72; Sircar, *The Muhammadan Law*, pp. 18-23.

⁹⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 166.

⁹¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 378.

⁹² Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 323.

⁹³ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 746.

9. *Usûl al-Hadîth 'Ulûmuhû wa Mustalahuhû* by Muhammad Ajjaj al-Khatib.⁹⁴

2.1.3.4 Shî'a Hadîth Books

1. *Al-Kâfî fi 'ilm al-Dîn* (The One Sufficient in the Knowledge of Religion). By Thiqat al-Islam al-Shaykh Abu Ja'far Muhammad ibn Ya'qub ibn Ishaq al-Kulayni (328/329/ 940). This is eight volumes containing 16,099 traditions with their authorities and sources, related to both *Usûl* and *Furû'*.

2. *Man lâ Yahduruhu al-Faqîh* (For the One Who Is Not in the Presence of Jurisprudents). By al-Shaykh Abu Ja'far Muhammad ibn 'Ali ibn Husayn ibn Babawayh al-Qummi (al-Shaykh al-Saduq) (381/991). This the work consists of four volumes, 9,044 Traditions.

3. *Tahdhîb al-Ahkâm* (Rectification of the Statutes). By Shaykh al-Ta'ifah, Abu Ja'far Muhammad ibn Hasan al-Tusi (460/1068). It consists of ten volumes with 13,416 *ahadîths* in 393 sections.

4. *Al-Istibâr (al-Istibâr fi ma ukhtulif fihi min al-akhbâr)* (Reflection on the Disputed Traditions). By al-Shaykh Abu Ja'far Muhammad ibn Hasan al-Tusi (460/1068). It consists of four volumes with 5,558 *ahadîths*.

5. *Bihâr al-Anwâr* (Oceans of Lights). By Muhammad Baqir ibn Muhammad Taqi al-Majlisi (1110/1690). It is 110 volumes. It is like a Shî'a encyclopedia on faith, law and history.

6. *Wasâ'il al-Shî'a*. By al-Shaykh Muhammad ibn Hasan al-Hurr al-'Amili (1104/1692). It consists of 29 volumes with 35,868 *ahadîths*.

7. *Mustadrak al-Wasâ'il wa Mustanbat al-Masâ'il*. By al-Hajj Mirza Husayn al-Nuri al-Tabarsi (1320/1902). It consists of 18 volumes.

2.1.4 Books of Tafsîr (Interpretation of the Holy Qur'an)

The Books of *Tafsîr* (Interpretation) are works that are intended to explain the Holy Qur'an. Those verses in the Holy Qur'an that are related to law have been particularly expounded by some authors.

2.1.4.1 Some Commentaries on the Qur'an

1. *Jâmi' al-Bayân fi Ta'wîl Ây al-Qur'an (Tafsîr al-Qur'an)* by Abu Ja'far Muhammad ibn Jarir al-Tabarî (310/922). The entire Muslim community has agreed that

⁹⁴ Aghnides, *Islamic Theories of Finance*, pp. 172-73.

nothing like this has been written. It is the most excellent and greatest of Qur'an commentaries and is the basic authority. It goes into the motives (*wajh*) of the opinions and indicates those that merit preference; it also takes up questions of syntax (*i'rab*) and legal deductions (*istinbât*).⁹⁵

2. *Mafâtîh al-Ghayb*, known as *al-Tafsîr al-Kabîr*, by Fakhr al-Dîn Muhammad ibn 'Umar al-Razi (606/1209). This is a large, unfinished work. The author wrote it to disconcert some of "the jealous people" who did not believe a statement by him to the effect that 10,000 propositions could be derived from the hidden meanings of the opening chapter of the Qur'an. The book is full of singular views and replete with the views of the philosophers.⁹⁶

3. *Rawâyi' al-Bayân Tafsîr Âyât al-Ahkâm min al-Qur'an* by Muhammad 'Ali al-Sâbûnî. This is a comparative and contemporary work.

4. *Al-Mîzân fi Tafsîri'l-Qur'an*, popularly known as *Tafsîr al-Mîzân*. This is a remarkable Shî'a Muslim *Tafsîr* (or exegesis of the Qur'an) written by Ayatollah Sayyid Muhammad Hussein Tabataba'i. The work consists of twenty volumes. Up until now more than three editions have been printed in Iran and Lebanon.⁹⁷

2.1.4.2 The Books on Ahkâm al-Qur'an (Qur'anic Fiqh)

2.1.4.2.1 Hanafî Works on Fiqh al-Qur'an

Among the Hanafî 'ulamâ, several have attained fame as contributing to the development of *fiqh al-Qur'an*. Some of their works are noted below.

1. *Ahkâm al-Qur'an*, by 'Ali ibn Hajar Sa'di al-Maruzi al-Khurasani (244/858).

2. *Ahkâm al-Qur'an al-Karîm*, by Abu Ja'far Ahmad al-Tahâwî (321/933). He explains Qur'anic verses from the Hanifite perspective especially.⁹⁸

3. *Ahkâm al-Qur'an* (Decrees of the Holy Qur'an) by Abu Bakr Jassas al-Râzî (370/980) from the City of Raz of Turkistan. He explains Qur'anic verses from the Hanafite perspective especially.⁹⁹

4. *Anwâr al-Qur'an fi Ahkâm al-Qur'an*, by Muhammad Kâfi ibn Hasan al-Basandi al-'Aqhisari (1025/1616).

⁹⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 370.

⁹⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 373.

⁹⁷ Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 54-112; Mannâ' al-Qattân, *Mabahith fi 'Ulûm al-Qur'an* (Beirut: al-Risâlah, 1996), pp. 376-81; Aghnides, *Islamic Theories of Finance*, pp. 167-68.

⁹⁸ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 80.

⁹⁹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 80.

5. *Anwâr al-Qur'an fi Ahkâm al-Qur'an*, by Muhammad Shams al-Dîn al-Harawî al-Bukhârî (1109/1697), apparently not printed.

6. *Ahkâm al-Qur'an*, by Isma'il Haqqi (1127/1715).

7. *Madârik al- Ahkâm and Anwâr al-Qur'an* by `Abd Allah al-Balkhi (1189/1775), not printed.

8. *Ahkâm al-Qur'an* by `Abd Allah al-Husayni al-Hindi (1270/ 1853).

9. *Nayl al-Murâd min Tafsîr Âyât al- Ahkâm*, by Muhammad Siddiq al-Bukhârî (1307/1889).

2.1.4.2.2 *Mâlikî Works on Fiqh al-Qur'an*

Several scholars among the Mâlikî `ulamâ, as well, have been noted for their substantial research and contributions to fiqh al-Qur'an. Some of these are noted below:

1. *Ahkâm al-Qur'an*, by Abmad ibn Mu'dhal (240/854).

2. *Ahkâm al-Qur'an*, by Muhammad ibn `Abd Allah, known as ibn al-Hakam (268/881).

3. *Ahkâm al-Qur'an*, by Isma'il ibn Ishaq al-'Azdi (282/895).

4. *Âyât al-Ahkâm*, by al-Qasim ibn Asbagh al-Qurtubi al-'Andalusi (304/916).

5. *Ahkâm al-Qur'an*, by Muhammad ibn Ahmad al-Tamimi (305/917).

6. *Ahkâm al-Qur'an*, by Musa ibn `Abd al-Rahman, known as Qattan (306/918).

7. *Ahkâm al-Qur'an*, by Muhammad ibn al-Qasim, known as ibn al-Qurtubi (355/966).

8. *Ahkâm al-Qur'an*, by Ahmad ibn `Ali, known as al-Baghati (401/1010).

9. *Ahkâm al-Qur'an* (Decrees of the Holy Qur'an) by Abu Bekr Muhammad ibn al-Arabî (543/1148). He explains Qur'anic verses from the Mâlikî perspective especially.¹⁰⁰

10. *Ahkâm al-Qur'an*, by `Abd al-Mun'im ibn Muhammad al-'Andalusi al-Gharnati (597/1200).

11. *Âyât al-Ahkâm*, by Yahya ibn Sa'dun al-'Azdi al-'Andalusi (670/ 1271).

12. *Al-Jâmi' Li Ahkâm al-Qur'an* by the Mâlikîd Jurist Abu `Abdullah al-Qurtubi or Abu `Abdullah Muhammad ibn Ahmad ibn Abu Bakr al-Ansari al-Qurtubi (1214-1273). We can say that this is an encyclopedia of Islamic Law according to the Qur'an.

13. *Mukhtasar Ahkâm al-Qur'an* by Makki ibn Abu Tâlib al-Qaysi al-Qayrawani (437/1045).

¹⁰⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 80.

2.1.4.2.3 *Shâfi'î Works on Fiqh al-Qur'an*

Several Shâfi'î *`ulamâ'* have become well known for their compilations concerning fiqh al-Qur'an. Some of their works are noted below.

1. *Ahkâm al-Qur'an*, compiled by Muhammad ibn Idris al-Shâfi'î, the leader of the Shâfi'î school of fiqh (204/819).
2. *Ahkâm al-Qur'an*, by Ibrahim ibn Khalid, known as Abu Tur al-Kalbi (240/854).
3. *Âyât al-Ahkâm*, by Ahmad ibn al-Husayn al-Bayhaqi (458/1066).
4. *Ahkâm al-Qur'an*, and *Ikhlîl fî Istinbat al-Tanzil*, by `Abd al-Rahman ibn Abu Bakr al-Misri (911/1505).
5. *Manâr al-Islam fî sharh Âyât al-Ahkâm*, by Ahmad Zayni Dahlin al-Hasani (1304/1886), Muftî of Makkah.
6. *Ahkâm al-Qur'an* by Ahmad ibn Yusuf Samin (756/1355).

2.1.4.2.4 *Hanbalî Works on Fiqh al-Qur'an*

Hanbalî *`ulamâ'* have also greatly contributed to this subject and compiled several treatises. Their works include the following.

1. *Âyât al-Ahkâm*, compiled by Qadi Abu Ya'la al-Kabir (458/1066).
2. *Âyât al-Ahkâm*, by Muhammad Abu Bakr al-Dimashqi, known as ibn al-Qayyim al-Jawziyya (751/1350).

2.1.4.2.5 *Shi'î Works on Fiqh al-Qur'an*

1. *Âyât al-Ahkâm* by Muhammad ibn Sa'ib al-Kalbi (146/763). Besides this book, he had written a complete Tafsîr of the Qur'an.

2. *Tafsîr al-Khamsemi'at Âyât al-Ahkâm*, by Muqatil ibn Sulayman al-Khurashni al-Balkhi (150/767).

3. *Tafsîr Âyât al-Ahkâm*, by Hisham ibn Muhammad ibn Sa'ib al-Kalbi al-Kufi (204 or 206/819 or 821).

4. *Ahkâm al-Ahkâm*, by `Abbad ibn al-`Abbas al-Taliqani (385/995).

5. *Fiqh al-Qur'an fî Âyât al-Ahkâm*, by Qutb al-Dîn al-Rawandi (573/ 1177).

6. *Kanz al-'Irfan fî Fiqh al-Qur'an*, by Fadil Miqdad ibn `Abd Allah al-Suyuri al-'Asadi al-Hilli (826/1423). This book has been translated into Persian.

7. *Minhâj al-Hidâyah fî Tafsîr Âyât al-Ahkâm*, by Ahmad ibn `Abd Allah, known as

ibn al-Mutawwaj (836/1432).

8. *Âyât al-Ahkâm*, by `Ali ibn Muhammad al-Shahaftiki al-Mashhadi (907/1501).

9. *Zubdah al-Bayân fi sharh Âyât Ahkâm al-Qur'an*, by Ahmad ibn Muhammad, known as al-Muqaddas al-'Ardabili (993/1585).

10. *Âyât al-Ahkâm* by Muhammad ibn 'Ali al-Husayni al-Mar'ashi (during the reign of Shah Tahmhsib I).

11. *Dala'il al-Maram fi Tafsîr Âyât al-Ahkâm*, by Muhammad Ja'far ibn Sayf al-Dîn al-'Astarabadi, known as Sharī'ahtmadar (1263/ 1847).

12. *Âyât al-Ahkâm*, by Muhammad Baqir ibn Muhammad Hasan Qayini (1352/1933)

2.1.4.2.6 Zaidî Works on Fiqh al-Qur'an

Some `ulamâ' among the Zaidîs who have acquired well-deserved fame have compiled books on *Âyât al-Ahkâm*. Some of their works are listed below.

1. *Sharh Âyât al-Ahkâm*, by Yahya ibn Hamzah al-Yemeni (749/1348).

2. *Sharh Âyât al-Ahkâm*; by Muhammad ibn Yahya Sa'di al-Yemeni (957/1550).

3. *Âyât al-Ahkâm*, by Husayn al-'Amri al-Yemeni (1380/1960).

2.1.4.2.7 Zâhirî Works on Fiqh al-Qur'an

Some `ulamâ' of the Zâhirî School have also written books on fiqh al-Qur'an. Their works include the following.

1. *Ahkâm al-Qur'an*, compiled by Dawud ibn 'Ali al-Zâhirî al-'Isfahani (201-270/816-883).

2. *Ahkâm al-Qur'an*, by `Abd Allah ibn Ahmad, known as ibn al-Mughallis (324/936).

2.1.4.3 The Books on the Science of Qur'an Interpretation ('Ulûm al-Qur'an)

1. *Al-Burhân fi 'Ulûm al-Qur'an* by Badr-al-Dîn Muhammad ibn 'Abdullah al-Zarkashi (794/1391).¹⁰¹

2. *Al-Itqân fi 'Ulûm al-Qur'an* by Jalâl-al-Dîn al-Suyûti (911/1277). This was intended as an introduction to the exhaustive Qur'an commentary he began writing, the *Majma' al-Bahrayn* and *Matla' al-Bahrayn*, which he apparently did not com-

¹⁰¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 72.

plete. The *Itqân* is the most useful of his works.¹⁰²

3. *Manâhil al-ʿIrfan fi ʿUlûm al-Qurʿan* by Muhammad Abdulazim al-Zarqani; two volumes.

4. *Mabâhith fi ʿUlûm al-Qurʿan*, by Subhi al-Sâlih. This manual offers good summaries.

5. *Mabâhith fi ʿUlûm al-Qurʿan* by Mannaʿ al-Qattan.¹⁰³

2.1.5 Monographic Works (Treatises=Rasâʿil)

As dissertations, thesis' and research articles are written today that reflect diverse opinions and ideas regarding important current legal issues that are supposed to be solved, this is the case for the history of Islamic Law as well. Especially when civil servants and officials trespassed against the law in any way, the jurists wrote concise treatises (monographic works or articles) that illuminated the legal aspects of the issue concerned, which – from our point of view – are among the most noteworthy references for Islamic Law. For instance, the issue of Cash Money Endowments in the Ottoman State was negotiated during the reign of Sultan Sulaiman the Legislator and there were about ten treatises on that subject, either for or against. The treatises by Abu al-Su'ûd, Bali Effendi and Birgivi are the most notable. Among those authors who defended the superiority of law in the state's affairs in the treatises they wrote and cast light on the history of Islamic Law we could cite Shaikh al-Islam Abu al-Su'ûd Effendi (982/1577), Ahmed Hamawi; Shaikh al-Islam Ibn al-Kamal (940/1533), Ibn Nuja'im, an Egyptian Hanafite jurist (970/1563), Hasan Shurunbilali (1069/1658) and Ibn al-'Abidin from the jurists in the area of Damascus in recent times. These are some Hanafite jurists; there are many jurists from other schools.¹⁰⁴

Some treatises (*Rasâʿil*) are the following.

1. Al-Ghazzâlî, *Majmûʿah Rasâil al-Ghazzâlî*. There are twenty-six *Risâlahs* that have been published.

2. *Rasâil Shaikh al-Islam* ibn al-Kamal (940/1533). There are many *Risâlahs* on Islamic sects; five *Risâlahs* on ilm al-kalâm; *Risâlah al-Tanbîh ala Ghalat al-Jâhil wa al-Nabih*.

3. *Majmûʿah Rasâil al-Hamawî* by Hâmid ibn Ali al-Imâdî al-Hamawî (1171/1757).

¹⁰² Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 234.

¹⁰³ Al-Qattân, *Mabahith fi ʿUlûm al-Qurʿan*, pp. 391-92; Aghnides, *Islamic Theories of Finance*, pp. 168-69.

¹⁰⁴ See especially Süleymaniye Library, Şehit Ali Pasha No: 782 (*Treatises by ibn al-Nujaim*); Yeni Cami, 1198 (*Treatises by Shurunbilali*) and Mahmud Effendi No: 1006 (*Treatises by Ibn al-Kamal*); ibn al-Abidin's son is a member of the Association of *Majalla*.

There are eighteen *Risâlahs*; among them we can mention *Salâh al-Âlam bi Iftâ' al-Âlim and Jawâb an al-Afyon*.

4. Ibn Taimiyya, *Majmû'ah al-Rasâ'il wa al-Masâ'il*. There are many *Risâlahs* for Ibn Taimiyya.

5. *Rasâ'il Shaikh al-Islam Abu al-Su'ûd Effendi* by Muhammad ibn Muhammad al-Imâdî (982/1577). There are many *Risâlahs* for Abu al-Su'ûd in different subjects. *Risâlah fi Waqf al-Nuqûd* is famous among them. There are approximately thirty *Risâlahs*.

6. *Rasâ'il Ibn Nujaym* or, as it is also called, *al-Rasâ'il al-Zayniyyah fi Fiqh al-Hanafiyyah*, by Zayn-al-'âbidîn ibn Nujaym al-Misri, an Egyptian Hanafîte jurist (970/1563); these books have been published again. There are forty *Risâlahs* on fiqh and one of them is *Risâlah fi Talab al-Yamin ba'da Hukm al-Mâlikî*.

7. *Rasâ'il Shurunbilali* by Hasan ibn Ammâr al-Shurunbilali (1069/1658). There are sixty-one *Risâlahs* in this *Majmû'ah*.

8. *Majmû'ah Rasâ'il Ibn 'Abidîn* by Muhammad Amin Efendi, known as ibn 'Abidîn (1250/1834) the Hanafîte. One of these, *Rasâ'il is 'Uqud Rasm al-Muftî*, gives valuable information about the original Hanafîte sources and the meanings of the terms used by Hanafîte *fuqahâ* in connection with the transmission of early opinions.¹⁰⁵

2.1.6 Lexicological Sources (*al-Ma'âjim*)

These sources are very important for explaining the terminology of Islamic law. For this reason we should mention some sources on different subjects.

1. **Personal Names:** *al-Mushtabih fi Asmâ' al-Rijâl* by Shams-al-Dîn Abu 'Abdullah Muhammad ibn Abu al-Dhahab (748/1347), the Shâfi'îte; gives the spelling of ambiguous proper names, ethnic names, surnames (*kunyah*) and honorary names (*alqâb*).

2. **Place Names:** *Mu'jam al-Buldân* by Yaqut ibn 'Abdullah al-Rûmî al-Hamawî (626/1228). This work gives the spelling of the names of towns, villages, countries, stations, mountains, rivers, etc., occurring in *hadîths*, histories, and poems, with situations indicated. It quotes the respective verses.¹⁰⁶

3. **Terms of the Qur'an:** 1) *Mufradât Alfâz al-Qur'an* by Abu 'I-Qâsim al-Husain ibn Muhammad al-Râgib al-Isfahânî (502/1108). This book has been alphabetically arranged and it is very usable. It cites verses and traditions.¹⁰⁷ 2) *Al-Mu'jam al-*

¹⁰⁵ <http://www.alazharonline.org>.

¹⁰⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 595.

¹⁰⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 624.

Mufahras li Alfâz al-Qur'an al-Karîm by Muhammed Fu'âd is a modern and useful work for researchers.

4. **Terms of the Tradition:** *al-Nihâyah fi Gharîb al-Hadîth wa'l-Athâr*, by Majd-al-Dîn Abu 'I-Sa'adat al-Mubarak ibn Muhammad al-Jazari ibn al-Athir (606/1209). Alphabetically arranged with respect to roots; quotes the entire *hadîth* where the word is found. It is very easy for reference and full of valuable information.¹⁰⁸

5. Terms of Islamic Law:

a) *Gharîb al-Fiqh* by Abu Mansûr Muhammad ibn Abu al-Azhari (370/980); explains words used by Shâfi'ite jurists.¹⁰⁹

b) *Mafâtih al-'Ulûm* by Abu 'Alî Muhammad ibn Abu al-Khuwarizmi al-Kâtib (387/997). Ed. G. van Vloten. Leiden: 1895; gives brief explanations of technical terms used in the sciences and arts (for example, *fiqh*, dogmatics, syntax, tax and other administration [*kitâbah*], music and chemistry) in separate chapters analytically arranged. It is very a valuable work.¹¹⁰

c) *Al-Mughrib fi Tartîb al-Mu'rib* by Abu 'I-Fath Nasir ibn 'Abd-al-sayyid al-Mutarrizi (610/1213) the Hanafîte. This is a condensed, alphabetically arranged version of his own *al-Mu'rib*. It explains words and locutions used in 'Hanafîte works on *fiqh*.¹¹¹

d) *Al-Ta'rifât* by 'Alî ibn Muhammad al-Jurjani, al-Sayyid al-Sharîf (816/1413) the Hanafîte. This is a well-known work giving brief definitions of technical terms only.¹¹²

e) *Ishârât ila ma Waqa'a fi Kutub al-Fiqh min al-Asmâ wa'l-Amâkin wa'l-Lugât* by Abu Tâhir Muhammad ibn Ya'qub al-Firuzâbâdi (817/1414); explains proper names and terms of *fiqh* books.

f) *Kashshâf Istilâhât al-Funûn* (1158/1745) by Muhammad 'Alî ibn 'Alî al-Tahanawi, the Hanafîte; explains technical terms by long quotations from standard works and contains an introduction on the definition, subject-matter, etc. of the sciences.

g) *Talibat al-Talabah*, by Abu al-Hafs al-Nasafi (537/1142), Hanafîte.

h) *Tahdhib al-Asmâ' wal-Lughât* by Imâm Nawawi (676/1277), second part; the first part is a dictionary of proper names occurring in works on Islamic Law) (Shâfi'î).¹¹³

¹⁰⁸ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 783.

¹⁰⁹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 202.

¹¹⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 611.

¹¹¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 605.

¹¹² Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 350.

¹¹³ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 413; Hawwa, *al-Madkhal ila Madhhab*, pp. 397-402; Aghnides, *Islamic Theories of Finance*, pp. 165-67.

2.1.7 Biographical Sources (Books of *Tabaqât*)

We should also mention in particular biographical works, called “books of *Tabaqât*” by former Muslim jurists, which give information on the life stories and works of jurists. Tashkopruzade’s work *Al-Shaqâ’iq al-Nu‘maniyyah* on the lives of Ottoman scholars and, again, his work *al-Tabaqât al-Hanafiyyah* on the lives of Hanafite jurists could be given as examples here. Apart from the independent books on *Tabaqât* that narrate the separate biographies of Shâfi‘î, Mâlikî, Hanbalî and Hanafî jurists, there are also books of *Tabaqât* that narrate the biographies of all Islamic jurists.

2.1.7.1 Companions and Followers

1. *Tabaqât al-Sahâbah wa’l-Tâbi‘în* or simply *Tabaqât ibn Sa‘d* by Abu ‘Abdullah Muhammad ibn Sa‘d al-Zuhri al-Basri (230/844). That is the earliest and the most comprehensive book.¹¹⁴

2. *Al-Isâbah fi Tamyîz al-Sahâbah* by Shihâb-al-Dîn Abu’l-Fadl Ahmed ibn ‘Ali ibn Hajar al-Asqalânî (852/1448) the Shâfi‘îte; contains in all 12,279 lives, omitting all but the Companions.¹¹⁵

2.1.7.2 General *Tabaqât*

1. *Târikh ‘Ulamâ al-Andalus* by Abu al-Walid ‘Abdullah ibn Muhammad al-Azdi ibn al-Faradi (403/1012). It gives briefly in alphabetical order the lives of 1,642 *fuqahâ*, jurists, etc. of Spain with indexes on persons, books and places appended.¹¹⁶

2. *Hilyah al-Awliyâ wa Tabaqât al-Asfiyâ* by Abu Na‘îm Ahmad al-Isfahanî (430/1038). This work contains information on most Muslim scholars and moral leaders.

3. *Târikh Baghdâd* by Abu Bakr Abu ibn ‘Ali al-Khatib al-Baghdadi (463/1070). A celebrated extensive history, particularly of the scholars, of Baghdad.¹¹⁷

4. *Kitâb Wafayât al-A‘yân wa Anbâ’u Abnâ al-Zamân* by Shams-al-Dîn Ahmed ibn Muhammad ibn Khallikan (672/1273) the Shâfi‘îte. This is a celebrated work relating the lives of persons of note in every area. It omits Companions and early caliphs as

¹¹⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 121.

¹¹⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 140.

¹¹⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 263.

¹¹⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 265.

too well known; alphabetically arranged according to real names.¹¹⁸

5. *Tahdhīb al-Asmā wa'l-Lugāt* by Abu Zakariyā Yahya ibn Sharaf al-Nawawi (676/1277), the Shāfi'ite. This is a very frequently quoted, useful work. The first part (*qism*) gives the proper names and the second part the common names and technical terms occurring in the Shāfi'ite *fiqh* books. It is alphabetically arranged according to with respect to real names, surnames, etc. grouped in separate sections. The lives presented are mostly those of Companions and Followers, with a few of the leading jurists of different schools.¹¹⁹

6. *Siyar A'lām al-Nubalā* by Shamsaddīn Muhammad Al-Dhahabī.

7. *Al-A'lām; Qamus li ashhar al-Rijāl wa al-Nisā* by Khayraddīn al-Zirikli. This is an encyclopedia on all Muslim scholars, orientalists and Islamologists.

8. *Qamus al-A'lām* by Shamsuddīn Sāmī, who was an Ottoman scholar. This book is useful, especially with respect to Ottoman scholars.

9. *Mu'jam al-Mu'allifīn* by 'Umar Ridha Kahhālāh. This is a new and important source for all Muslim authors.¹²⁰

2.1.7.3 Hanafīte *Tabaqāt*

1. *Al-Jawāhir al-Mudhi'ah*, by Muhyi-al-Dīn 'Abdulqādir ibn Abu al-Wafa al-Qurayshi al-Misri (775/1373).¹²¹

2. *Tāj al-Tarājim Taḥqīq al-Hanafīyyah* by Abu al-Fadl Zayn-al-Millāh Wa'l-Dīn al-Qāsim ibn 'Abdullah ibn Qutlubugha (879/1474). The work deals only with jurists who left writings – in all, 330 persons.¹²²

3. *Al-Shaqā'iq al-Nu'maniyyah fi 'Ulamā al-Dawlah al-'Uthmaniyyah* by Mawla Ahmed ibn Mustafa Tashkopruzādeh (968/1560) with additions and supplements by Majdī and 'Atā'ī. The work contains about 600 lives. It was written to save the *fuqahā* (*ulamā*) who lived and flourished in the Ottoman Empire from oblivion. Many supplements were written of which extensive was a 7-volume work by Atā'ullah New'ī-zādeh.¹²³

4. *Al-Tabaqāt al-Saniyyah fi Tarājim al-Hanafīyyah*, by Taqī-al-Dīn ibn 'Abdulqādir al-Tamimi al-Gazzi (1010/1601), with an introduction. This book is alphabetically ar-

¹¹⁸ Kātib Chelebi, *Kashf al-Zunūn*, vol. II, p. 804.

¹¹⁹ Kātib Chelebi, *Kashf al-Zunūn*, vol. I, p. 413.

¹²⁰ Kātib Chelebi, *Kashf al-Zunūn*, vol. I, p. 530; Tashkopruzadeh, *Miftāḥ al-Sa'ādah*, vol. I, pp. 260-61.

¹²¹ Kātib Chelebi, *Kashf al-Zunūn*, vol. I, p. 482.

¹²² Kātib Chelebi, *Kashf al-Zunūn*, vol. II, p. 117.

¹²³ Kātib Chelebi, *Kashf al-Zunūn*, vol. II, p. 84.

ranged with respect to proper names (*asâmî*). There are separate sections for ethnic (*ansâb*) and honorary names (*alqâb*). This is the most excellent of the works composed on the lives of Hanafites (*ahl al-ra'y*): It includes the lives of the *Shaqâ'iq* and later works until the author's time, namely 993/1585, the year of its completion.¹²⁴

2.1.7.4 Shâfi'îte *Tabaqât*

Al-Tabaqât al-Shâfi'iyyah, by Taj-al-Dîn 'Abd-al-wahhâb al-Subki (771/1369). Overflowing with information, this work was intended by the author to include the name of every jurist mentioned in the books of his time. It often quotes long passages from their works and relates debates, etc. at length. Alphabetical (but not strictly so) with respect to real names (*asmâ'*) within each group, except those jurists whose first name is Ahmad, and then those first name Muhammad. These are treated first. The first group gives al-Shâfi'î's personal disciples; the other groups consist of jurists who died in the same century.¹²⁵

2.1.7.5 Mâlikîte *Tabaqât*

1. *Tartîb al-Madârik wa Taqrîb al-Masâlik li Ma'rifat A'lâm Madhhab Mâlik* by al-Qâdhî 'Iyadh ibn Musa al-Yahsab (544/1149). An esteemed work that is much quoted.¹²⁶

2. *Al-Dîbâj al-Mudhahhab fi Ma'rifat A'yân Ulamâ' al-Madhhab*, also *Tabaqât al-Mâlikiyyah* by Burhân-al-Dîn Ibrahim ibn 'Alî ibn Farhûn (799/1396). This is an elegant work.¹²⁷

2.1.7.6 Hanbalîte *Tabaqât*

1. *Tabaqât al-Hanbaliyyah* (513/1119), by al-Qâdhî Abul Husayin Muhammad ibn Muhammad al-Farrâ' al-Bagdâdi (526/1131).

2. *Zayl Tabaqât al-Hanbalîyyah* by ZaynudDîn Abdurrahman ibn Rajab al-Dimishqi (795/ 1393).¹²⁸

¹²⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 117; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. I, p. 261.

¹²⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 118; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. I, p. 261.

¹²⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 332.

¹²⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 123; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. I, p. 261.

¹²⁸ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, 116; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. I, p. 261.

2.1.7.7 Shi'ite *Tabaqât*

1. *Majâlis al-Mu'minîn* (996/1587) by Nurallah ibn Sharîf al-Husayni al-Shushtari. This is a frequently quoted work.

2. *A'yân al-Shi'a*, by Sayyid Muhsin al-Amin, six volumes. Damascus: Dâr al-Ta'âruf 1935.¹²⁹

2.1.8 *Bibliographical Sources*

1. *Kitâb al-Fihrist* or *Fihrist al-'Ulûm* (377/987) by Abu al-Faraj Muhammad ibn Ishaq al-Warrâq al-Bagdadi. A list of the Arabic books written up to 377/987, topically arranged with occasional bibliographical details. Good with respect to the earliest writers.¹³⁰

2. *Fihrist Kutub al-Shi'a* by Abu Ja'far Muhammad ibn al-Hasan al-Tûsi (459/1066), the Imâmîte. It gives a list of Shi'ite works.

3. *Kitâb al-'Ibar we Dîwân al-Mubtadâ we al-Khabar fi Ayyâm al-'Arab we al-'Ajam we al-Barbar*, etc. by Abu Zaid 'Abdurrahman ibn Muhammad ibn Khaldun al-Maghribi (808/1405) the Mâlikîte; contains a valuable bibliographical and critical review of the literature of the religious and other sciences.¹³¹

4. *Miftâh al-Sa'âdah we Misbâh al-Siyâdah* by Abu al-Khayr Abu ibn Muslih-al-Dîn Mustafa Tashkopruzadeh (968/1560) the Hanafîte. It describes the subjects of 159 disciplines, indicating the well-known books pertaining to each.¹³²

5. *Kashf al-Zunûn 'an Asâmî al-Kutub wa'l-Funûn* by Mustafa ibn 'Abdullah Kâtib Chelebi Haji Khalifah (1068/1657). Aside from the Mâlikîte works, it gives a nearly exhaustive list of Arabic (also Turkish and Persian) books arranged alphabetically according to title, with a long introduction to science, its definition, purpose, division, etc., and with learned reviews of the different sciences and their literature in their proper places. It is profuse in giving dates of death and bibliographical information.¹³³

2.1.9 *History Books (Especially Histories of Institutions)*

History books play a great role in the references for the history of Islamic Law. For example, the history by Mustafa Nuri Pasha called *Natâiyij al-Wuqu'ât* (Conse-

¹²⁹ Hawwa, *al-Madkhal ila Madhhab*, pp. 406-28; Aghnides, *Islamic Theories of Finance*, pp. 159-63.

¹³⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 275.

¹³¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 138.

¹³² Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 615.

¹³³ Aghnides, *Islamic Theories of Finance*, pp. 163-65.

quences of Events) and the history by Jawdat Pasha called *Târikh-i Jawdat (History of Jawdat)* are very important, for they not only include chronological information but also give information on the legal, social and economic aspects of the Ottoman state. Still, all the works written by I.H. Uzunçarşılı during the Republican Age and Ö.L. Bar-kan's works on the history of economics are essential references for Islamic Law during the Ottoman period.

Among books of history are found some that only elaborate on the organization and bureaucratic life of the state, such as that by the Mamlukid scholar Kalkashandi called *Subh al-A'shâ fi Sinâ'ah al-Inshâ* (fourteen volumes, Egypt, 1913), which are particularly significant references for Public Law. What is more, the works by the officials of *Dîwân al-Inshâ* in various Islamic states (as in the Mamlukids) and those of the official historians in the Ottoman State that began to be called *Waq'ânuwis* (Writers of Events) from the 14th. century onwards are original references. Apart from the aforesaid works, the following could be included among history books as original and authentic references for the history of Islamic Law: books of memoirs (like Ahmed Jawdat's *Tadhâkir*), travel books like Awliya Chelebi's *Seyâhatnâme* (Travel Book), *Safâratnâmahs* (Ambassadors' Memoirs) and *Siyâsatnâmahs* (Politicians' Memoirs), which closely concern public law (like the *Siyâsatnâmah* by Nizâm al-Mulk, Kochi Bey's *Treatise* and Abu Yusuf's *Kitâb al-Kharâj*).¹³⁴

2.1.10 Books on Differences among Islamic Law Schools (*Ikhtilâf al-Madhâhib*)

The differences center mainly on the derivative legal rulings (*furû'*) and principles of *fiqh* (*usûl al-fiqh*) rather than the fundamental principles of religion. *Ikhtilâf*, which means disagreement, difference of opinion and diversity of views, especially among the experts of Islamic law, is widely recognized in Islamic tradition as a natural phenomenon. In its meaning as diversity, *Ikhtilâf* is also a recurring theme in the Qur'an, with reference to the diverse phenomena of nature and diversity as a sign of God and proof of God's existence and creation.¹³⁵ According to a saying by Prophet Muhammad, diversity among the Muslim people is a blessing (*Ikhtilâfu ummati rahmah*).¹³⁶

¹³⁴ Cf. Ahmet Mumcu and Coşkun Üçok, *Türk Hukuk Tarihi Ders Kitâbı*, (Ankara: Law School, 1982), pp. 166 ff.

¹³⁵ The Qur'an: 2:164; 3:190; 10:6; 23:80; 30:22; 45:5.

¹³⁶ This *Hadîth* is cited in al-Nawawi's commentary on *Sahîh Muslim*, a book on *waqf*. *Sahîh Muslim*, p. 91. The authenticity of this *Hadîth* was questioned by several scholars. Al-Khattabi, in his commentary on *Sahîh Muslim*, mentions that Jahiz and Musili had rejected this *Hadîth*, saying that if disagreement was a blessing, then agreement would be punishable. Al-Khattabi, however, explains that disagreement here particularly refers to legal matters, not to disagreement in matters of belief.

The Islamic tradition takes pride in sciences developed for studying the differences in the recitation and interpretation of the Qur'an and the differences in the transmissions of the *Hadîths*, the reports about Prophet Muhammad's statements, and the *Sunnah*, his practices. Since the beginning of the development of *fiqh*, *Ikhtilâf* among the jurists did not only exist but was also respected.¹³⁷

In Islamic jurisprudence *Ikhtilâf al-fuqahâ* (disagreement among the jurists) is one of the most frequently discussed subjects, yet current studies of Islamic law generally ignore its implications for the development of *fiqh* and its relevance for law reform in the modern context. It is neither possible nor advisable to analyse the doctrine of *Ikhtilâf al-fuqahâ* in detail in this short space. Therefore, we would like to underscore the significance of *Ikhtilâf al-fuqahâ* as a rich source for understanding the development of the Islamic legal tradition and as an important juristic tool for reinterpreting Muslim family laws in today's globalised world in which difference is increasingly valued.¹³⁸

We could mention some books relating to comparative law in the law schools:

1. *Ikhtilâf al-Fuqahâ* by Abu Ja'far Muhammad ibn Jarir al-Tabarî (310/922), the Shâfi'îte.¹³⁹

2. *Sharhu Ma'ânî al-Âthâr (Ikhtilâf al-Fuqahâ)* by Abu Ja'far Abu ibn Muhammad al-Tahâwi (321/933), the Hanafîte.¹⁴⁰

3. *Ta'sîs al-Nazar* by al-Dabbusi, al-Hanafî (430/1039).¹⁴¹

4. *Bidâyah al-Mujtahid wa Nihâyah al-Muqtasid* (ibn Rushd), by Abu al-Walid Muhammad ibn Ahmed ibn Rushd al-Qurtubi, known as ibn Rushd al-Hafid (the grandson) (595/1198). It is a masterly analysis of the main issues in law, with the views held by jurists of various schools and the grounds underlying their viewpoints ably discussed. The grounds ascribed by ibn Rushd to the jurists do not, therefore, always tally with those claimed by them.

5. *Rahmah al-Ummah fa Ikhtilâf al-A'immah* (780/1378), by Sadr-al-Dîn Muhammad al-Dimashqî al-'Uthmânî, the Shâfi'îte.¹⁴²

6. *Al-Mizân al-Kubrâ*, by 'Abd-al-Wahhâb ibn Abu al-Sha'rânî (973/1565), the

¹³⁷ Zuhaylî, *al-Fiqh al-Islamî*, vol. I, pp. 83-89.

¹³⁸ Muhammad Khalid Masud, "Ikhtilâf al-Fuqahâ: Diversity in Fiqh as a Social Construction," in *Wanted: Equality and Justice in the Muslim Family*, ed. Zainah Anwar Musawah (Kuala Lumpur: Sisters in Islam, 2006), pp. 65-93.

¹³⁹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 90.

¹⁴⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 591.

¹⁴¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 291.

¹⁴² Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 630.

Shâfi'îte.¹⁴³

2.1.11 Books on Religious and Philosophical Sects

1. *Kitâb al-Farq bayn al-Firaq wa Bayân al-Firqah al-Nâjiyah minhum* by Abu Mansûr 'Abdulqâdir ibn Tâhir al-Bagdadi (429/1037) the Shâfi'îte.¹⁴⁴

2. *Kitâb al-Fisal fi al-Milal wa'l-Nihal* by Abu Muhammad 'Ali ibn Ahmed ibn Hazm (456/1064), the Zâhirîte. That is a polemical book, going into lengthy metaphysical and other arguments.¹⁴⁵

3. *Kitâb al-Milal Wa'l-Nihal* by Abu al-Fath Muhammad ibn 'Abd-al-karim al-Shahristâni (548/1153). This is a compact work treating religious and philosophical sects in general in a clear and concise way.¹⁴⁶

2.1.12 Books and Works by Non-Muslim Scholars

Non-Muslim scholars started to pay attention to and research Islamic Law since the beginning of the colonial period. For example, Dutch scholars or orientalists started to research the Shâfi'î School because the Dutch had invaded Indonesia. French orientalists became interested in the Mâlikîte School because the French had invaded North Africa. German orientalists have been interested generally in Islamic Law. For this reason we will classify books of orientalists, now called Islamolog, into different kinds.

2.1.12.1 General Books and Works by Non-Muslim Scholars

1. Von Kremer, A., *Culturgeschichte des Orients under den Chalifen*. Vienna 1875-77; chapters on law, pp. 470-547, and science and literature, vol. II, pp. 396-484. Also goes into the origin of *fiqh*.

2. Goldziher, Ignaz, *Muhammadanische Studien*. 2 vols., (1889-90), Hildsheim, 1961; trans. by C. R. Barber & S. M. Stern, *Muslim Studies*, 2 vols., London, vol. I: 1967, vol. II: 1971. The work contains a chapter (vol. II) on *hadîth* literature. It is a masterly study of the entire subject of *hadîth*; *die Zâhirîten*, Leipzig, 1884.

¹⁴³ Tashkopruzadeh, *Miftâh al-Sa'âdah* vol. II, p. 556; Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 732; Aghnides, *Islamic Theories of Finance*, p. 194.

¹⁴⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 660.

¹⁴⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 660.

¹⁴⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 660; Aghnides, *Islamic Theories of Finance*, pp. 194-95; Fy-zee, *Outlines of Muhammadan Law*, pp. 487-93.

3. Brockelmann, Carl, *Geschichte der arabischen Litteratur*, Zweite den Supplementbänden angepaßte Auflage. Leiden, E.J. Brill, 1943–49. 2 supplementary volumes. Leiden: Brill, 1937–42. 3 vols. Vol. I divides Arabic literature into two main periods: Book I looks at Arabic literature from its beginning until the downfall of the Umayyads. Book II explores Islamic literature in Arabic in a period of about 300 years. Within each of these periods, Brockelmann treats the literature according to subject: first *belles lettres*, then history, then religious writing, *hadith*, *fiqh*, Qur'an exegesis, mysticism, then astronomy and medicine, and finally encyclopedias. In each category the authors and works cited are grouped geographically. Vol. II is organized slightly differently from Vol. I. The periods treated are as follows: Book III looks at the decline of Islamic literature first from the period of Mongol rule until the conquest of Egypt by Sultan Selim in 1517, then from 1517 to the Napoleonic expedition to Egypt in 1798, and finally from 1798 to the present (i.e., ca. 1900).

The Supplementary Volumes: Volume I supplements the first two books of Vol. I of the original work. It includes an appendix of corrections and additions. Vol. II supplements book III of Vol. II of the original work. It has an appendix of authors whose time and place cannot be ascertained, arranged alphabetically according to the European alphabet, within subjects, in the same order as given above for Vol. I. Vol. III of the supplement is devoted to modern Arabic literature up until the outbreak of the Second World War, organized by country and then by literary genre.

4. MacDonald, D. B., *Development of Muslim Theology, Jurisprudence and Constitutional Theory*, Lahore: Premier Book House, 1960.

5. Schacht, J. *The Origins of Muhammadan Jurisprudence*, Oxford: Oxford University Press 1959; *An Introduction to Islamic Law*. Oxford: Oxford University Press 1964. Brief, but contains the most exhaustive references to modern books and articles.

6. The *Encyclopedia of Islam (EI)* is the standard encyclopedia of the academic discipline of Islamic studies. It contains articles on distinguished Muslims of every age and country, on tribes and dynasties, on the crafts and sciences, on political and religious institutions, on the geography, ethnography, flora and fauna of the various countries and on the history, topography and monuments of the major towns and cities. In its geographical and historical scope it encompasses the old Arabo-Islamic empire, the Islamic countries of Iran, Central Asia, the Indian sub-continent and Indonesia, the Ottoman Empire and all other Islamic countries.

It is an encyclopedia *about* the Islamic world, not a Muslim or an Islamic encyclopedia. Topics deal mostly with the pre-modern period, but some entries are contemporary. The primary editor was Martijn Theodoor Houtsma (M. Th. Houtsma).

7. J. Zaidan, *Târikh al-Tamaddun al-Islâmî*, (Cairo: Dar al-Hilal, 1958).

8. Coulson, J. *A History of Islamic Law*. Edinburgh: Edinburgh University Press

1994.

9. Snouck Hurgronje, C. "Le droit musulman," *Revue de l'histoire des religions* 37 (1898): 1ff, and 174ff; *Verspreide Geschriften*, vol. II Bonn and Leipzig: 1923, cf. also *Selected Works of C. Snouck Hurgronje*. Edited in English and in French by G.-H. Bousquet and J. Schacht. Leiden: Brill, 1957. The writings of Snouck Hurgronje are fundamental for understanding the nature of Islamic Law from the Western Perspective.

10. Gibb, H.A.R. *Modern Trends in Islam*. Chicago: The University of Chicago Press, 1947; H.A.R. Gibb and H. Bowen, *Islamic Society and the West*. London: Oxford University Press, 1950-57.

11. Macnaghten, W.H. *Reports of Cases Determined in the Court of Nizâmut Adawlut*. Calcutta: 1827; *Principles and Precedents of Mohummudan Law*. Calcutta: 1825.

12. Baillie, N.B.E. *The Mohummudan Law of Sale and The Land Tax of India: Introductions*. London: Smith, Elder, & Co., 1853.

13. Wilson, Sir Roland Knyvet, *An Introduction to the Study of Anglo-Muhammadian Law*. London: 1894.

14. Wilson Sir R.K. *Anglo-Muhammadian Law*, London: 1930.

15. Tyabji F.B., *Muhammadian Law*. 3rd ed. Bombay: 1940.

16. Milliot, Louis. *Introduction a l'etude du Droit Musûlman*. Paris: Recueil Sirey, 1953.

17. Tyan Emile. *Histoire de l'Organisation Judiciaire en Pays d'Islam*. Paris: Institutions du Droit Public Musûlman, 1938-43; 1954-56.

18. Hallaq, Wael B. *A History of Islamic Legal Theories: An Introduction to Sunnî Usûl al-Fiqh*. Cambridge: Cambridge University Press, 2007; *The Origins and Evolution of Islamic Law*. Cambridge: Cambridge University Press, 2007; *Authority, Continuity, and Change in Islamic Law*. Cambridge: Cambridge University Press, 2001; *The Formation of Islamic Law*. Aldershot: Ashgate/Variorum, 2004.

19. Peters, Rudolph. *Crime and Punishment in Islamic Law*. Cambridge: Cambridge University Press, 2005; *Jihâd in Classical and Modern Islam*, 1996; *Sharî'ah Criminal Law in Northern Nigeria*. 2003.

20. Gleave, Robert, and Eugenia Kermeli. *Islamic Law: Theory and Practice*. London: I.B.Tauris, 2001.

21. Mallat, Chibli, and Jane Frances Connors. *Islamic Family Law*. Leiden: Brill, 1990.

22. Khadduri Majid and Herbert J. Liebesny. *Origin and Development of Islamic*

Law. Washington: AMS Press, 1984.

23. Vogel Frank E., and Samuel L. Hayes. *Islamic Law and Finance: Religion, Risk, and Return*. Leiden: Brill, 1998.

24. Haddad, Yvonne Yazbeck and Barbara Freyer Stowasser. *Islamic Law and the Challenges of Modernity*. Walnut Creek: Rowman Altamira, 2004.

25. Masud, Muhammad Khalid, Brinkley Messick, and David Powers. *Islamic Legal Interpretation: Muftîs and Their Fatwâs*, Cambridge: Harvard University Press, 1996.

26. Mumîsa, Michael. *Islamic Law: Theory and Interpretation*. Maryland: Amana Publications, 2002.

27. Motzki, Harald, and Marion H. Katz. *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools*. Leiden: Brill, 2002.¹⁴⁷

2.1.12.2 Books and Works by Non-Muslim Scholars on the Hanafi school

1. Pacha, Savvas, *Etudes sur la theorie du droit musulman*. Paris: 1892; *Le droit musulman explique*. Paris: 1896, with special reference to those used in instruction in Madrasahs in the Ottoman State.

2. D'Ohsson, Muhammad de M. *Tableau général de l'empire ottoman*. Paris:, 1787. This work contains an account of the actual legal system, based on the *Multaqâ 'l'Abhur*.

3. Aghnides, Nicholas. *Islamic Theories of Finance: With an Introduction to Islamic Law and a Bibliography*. New York: Columbia University, 1916. This is an excellent book on the principles of Islamic Law and Financial law. We have benefited a great deal from it and have cited many parts from that book.

4. Heidborn, A. *Manuel de droit public et administratif de d'Empire ottoman*. Vienna/Leipzig: 1908.

5. Gattesehi, D. *Real Property, Mortgage and Waqf according to Ottoman Law*. Translated from Italian by E.A. Van Dyck. London: 1884.

6. Gatteschi, D. *Manuale di Diritto Pubblico e Privato Ottomano*. Alexandria: 1865. This work reflects conditions before the introduction of the Mejlle.

7. Young, G. *Corps de droit Ottoman*. Oxford: Oxford University Press, 1905-06. This book is about Majalla.

8. Baillie, B.E. *The Mohummudan Law of Inheritance according to Aboo Huneefa*

¹⁴⁷ Aghnides, *Islamic Theories of Finance*, pp. 164-65, 195-96; Fyze, *Outlines of Muhammadan Law*, pp. 487-93; J. Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964), pp. 215-85.

and his Followers. London: 1874.¹⁴⁸

2.1.12.3 Books and Works by Non-Muslim Scholars on the *Shâfi'î* School

1. Juynboll, T. W. *Handbuch des islamischen Gesetzes*. Leiden/Leipzig: 1910. Trans. G. Baviera, *Manuale di diritto musulman*. Milan: 1916]; *Handleiding tot de kennis van de Mohammedaansche wet*. Leiden: Brill, 1925; reprinted 1930. This work concentrates on the Islamic aspect, the religious duties, and those institutions that have remained of practical importance for the Muslims in Indonesia, the *Shâfi'î* school. The main source for this book is *Minhâj al-Tâlibîn for al-Nawawî*.¹⁴⁹

2. Payne, C. H. Withers. *The Mahomedan Law of Inheritance According to the School of Shâfi'î*. Singapore: Printers, Ltd., 1932.

2.1.12.4 Books and Works by Non-Muslim Scholars on the *Mâlikî* School

1. Tores, Muhammad Del Nido Y. *De recho musulman*, Tetuan: 1927. This is a treatise on private law, with particular reference to the practice of law in the former Spanish zone of Morocco; the *Mâlikî* school.

3. Bousquet, G.H. *Précis de droit musulman*, vol. II: *Le Droit musulman par les textes*. 3rd ed. Algiers : 1960; *Du droit musulman et de non application effective dans le monde*. Algiers : 1949.

4. Vincent, Muhammad B. *Etudes sur la loi musulmane. Législation criminelle*. Paris: 1842. This work gives historical, bibliographical information on early important *Mâlikî* works of law.

5. Berque, J. *Essai sur la méthode juridique maghrébine*. Rabat : 1944.

6. A. Guiraud. *Jurisprudence et procédure musulmanes*. Casablanca : 1925 ; Tunis: 1948.

7. Norès, Ed. *Essai de codification du droit musulman algérien* (statut personnel).

8. Ghali, R. *De la tradition considérée comme source du droit musulman*. Paris: 1909.

9. Morand, Muhammad. *Avant-Projet de code du droit musulman algérien*. Algiers: 1916. (with detailed annotations).

10. Roussier, J. *Le Mariage et sa dissolution dans le statut civil local algérien*. Al-

¹⁴⁸ Aghnides, *Islamic Theories of Finance*, pp. 164-65, 195-96; Fyzee, *Outlines of Muhammadan Law*, pp. 487-493; Schacht, *An Introduction to Islamic Law*, pp. 215-85.

¹⁴⁹ Nicolas Aghnides, *Islamic Theories of Finance*, pp. 164-65, 195-96; Fyzee, *Outlines of Muhammadan Law*, pp. 487-93; Schacht, *An Introduction to Islamic Law*, pp. 215-85.

giers: 1960.¹⁵⁰

2.1.13 Some Books by Muslim Scholars in Western Languages

1. Rahman, Abdur. *Muhammadian Jurisprudence*. Madras: 1911.
2. Fyzee, Asaf A.A. *Outlines of Muhammadian Law*. Delhi: 1978. *A comprehensive manual, containing Shi'î and Sunnî outlines and references; Compendium of Fatimid Law*.
3. Yusoof, Mahomed, *Mahomedan Law Relating to Marriage, Dower, Divorce, Legitimacy and Guardianship of Minors*, 3 vols. Calcutta and London: 1895-98; with translations from Arabic texts.
4. Rahman, A.F. Muhammad Abdur. *Institutes of Mussalman Law: A Treatise on Personal Law*. Calcutta: 1907; with extraxts from Arabic texts; inspired by the work of Kadri Pasha.
5. Mulla, D.F. *Principles of Mahomedan Law*. 14th ed. Calcutta: 1855.
6. Sircar, Shama C., *Muhammadian Law: Tagore Law Lectures*. Calcutta: 1873 and 1874.
7. Azîz, Ahmad. *Islamic Law in Theory and Practice*. Lahore: 1956.
8. Maudoodi, Abul A'la. *Islamic Law and Constitution*. Karachi: 1955; *The Islamic Law and its Introduction in Pakistan*. Karachi: 1955; *The Limits of Legislation in Islam and the Place of Ijtihâd in It* (in Urdu).
9. Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence*. City Kuala Lumpur: Plenaduk Publications. 1944. This is a good manual on *Usûl al-Fiqh*.
10. Ramic, Sukrija Husejn. *Language and the Interpretation of Islamic Law*. Cambridge: The Islamic Texts Society, 2003. This is a good work on *Usûl al-Fiqh*.
11. Auda, Jasser. *Maqasid al-Shar'ah as Philosophy of Islamic Law: A Systems Approach*. London: The International Institute of Islamic Thought, 2008.
12. Bakhtiar, Laleh, 'Abd al-Rahmân al-Jazîrî, Kevin Reinhart, and Muhammad Jawâd Maghnîyah. *Encyclopedia of Islamic Law: A Compendium of the Views of the Major Schools*. Based on two main Arabic sources: *al-Fiqh alal madhhab al-arba'ah* and *al-Fiqh alal madhhab al-khamsa*. Cairo: ABC International Group, 1996.
13. 'Azmah, 'Azîz. *Islamic Law: Social and Historical Contexts*. London: Routledge, 1988.
14. al-Dîn, Mû'il Yûsuf 'Izz. *Islamic Law: From Historical Foundations to Contem-*

¹⁵⁰ Aghnides, *Islamic Theories of Finance*, pp. 164-65, 195-96; Fyzee, *Outlines of Muhammadian Law*, pp. 487-93; Schacht, *An Introduction to Islamic Law*, pp. 215-85.

porary Practice. Edinburgh: Edinburgh University Press, 2004.

15. Nyazee, Imran Ahsan Khan. *Bibliography of Islamic Law: The Original Sources*. (Law Publishers, 1995; *Islamic Jurisprudence: Usûl al-Fiqh*. International Institute of Islamic Thought, 2000.

16. Islahi, Amin Ahsan,, and S. A. Rauf. *Islamic Law: Concept and Codification*. Kazi Publications, Incorporated, 1988.

17. Abbas, Amanat, and Frank Griffel. *Sharî'ah: Islamic Law in the Contemporary Context*. Stanford: Stanford University Press, 2007.

18. Muslehuddin, Mohammad. *Philosophy of Islamic Law and the Orientalists: A Comparative Study of Islamic Legal System*. Islamic Publications, 1977.

19. Maududi, Sayyid Abul A'la, and Khurshid Ahmad. *The Islamic Law and Constitution*. Islamic Publications, 1960.

20. Arabi, Oussama. *Studies in Modern Islamic Law and Jurisprudence*. Leiden: Brill, 2001.

21. Khan, Rashid Ahmad. *Islamic Jurisprudence*. Muhammad Ashraf, 1978.

22. Faruki, Kemal A. *Islamic Jurisprudence*. National Book Foundation, 1975.

23. Hasan, Ahmad. *The Early Development of Islamic Jurisprudence*. London: Islamic Research Institute, 1970.

24. Alauya, Saaduddin A. *Fundamentals of Islamic Jurisprudence: With Appendix, Islamic Penal Law*. Manila: Rex Bookstore, Inc., 1999.¹⁵¹

25. Fuat Sezgin, *Geschichte des arabischen Schrifttums (GAS)*, 12 vols. to date, Leiden: E. J. Brill, 1967 onwards, from 2000 onwards Frankfurt am Main: Institut für Geschichte der Arabisch-Islamischen Wissenschaften. This work is a bio-bibliographical survey of Islamic literature up to about the middle of the eleventh century, arranged according to subject. For all known authors Fuat Sezgin lists all known works and all available manuscripts or printed editions thereof, as well as all related modern literature. This work supersedes the work of C. Brockelmann in different respects.

2.1.14 Books on Legal Maxims of Islamic Law (*al-Qawa'id al-Kulliyah al-Fiqhiyyah*)

1. *Al-Ashbâh wa'l-Nazâ'ir* by Zayn-al-'âbidîn ibn Nujaym (970/1562). This is the only Hanafîte work where general legal principles are discussed as such and not incidentally with respect to the legal determination of cases. It is probably the best

¹⁵¹ Aghnides, *Islamic Theories of Finance*, pp. 164-65, 195-96; Fyzee, *Outlines of Muhammadan Law*, pp. 487-493; Schacht, *An Introduction to Islamic Law*, pp. 215-85.

source for obtaining knowledge of the extent to which Hanafîte legal discussion becomes strictly scientific. The author is not a pioneer in this respect, since he admits to having followed the examples of Tâj-al-Dîn al-Subkî (771/1369) the Shâfi'îte. The work treats, in seven sections (*fasl*), general principles (*gawâ'id kulliyyah*), extensively drawn upon in the *Majalla*, similarities, differences, niceties, legal tricks, etc.¹⁵²

2. *Kitâb al- Ashbâh wa'l-Nazâ'ir* by Jalâluddîn Suyutî (911/1505), Shâfi'î.¹⁵³

3. *Al-Qawâ'id* by ibn Rajab (795/1393), Hanbalî.

4. *Kitâb al-Furûq: Anwâr al-Burûq fi Anwa' al-Furûq* by Ahmad ibn Idris Qarafi (684/1285).

5. *Majalla-i Ahkâm-i 'Adliyyah*. The first 100 articles are on general principles. The *Majalla* incorporates the Hanafî *fiqh* related to *buyu'* (commercial transactions) codified during the Ottoman period. The English translation of this by C.R. Tyser *et al.*, called *The Majalla*, was published in 1967 by the All Pakistan Legal Decisions on Nabha Road, Lahore.

6. *Kitâb Majalla al-Ahkâm al-Shar'iyyah 'ala Madhhab al-Imâm Ahmad ibn Hanbal al-Shaybani* by Qari, Ahmad 'Abdullah (Jeddah: 1981). This is the Hanbalî counterpart of the Hanafî *Majalla*.¹⁵⁴

2.1.15 Comparative and Contemporary Books by Muslim Scholars

We should divide this group into different categories. First of all, the main characteristic of contemporary books is that they are intended to be comparative. This is true for books on *fiqh* or *Usûl al-Fiqh*. We should draw attention to a new group of Islamic law books, i.e. Islamic Law concerning Muslim minorities (*Fiqh al-Aqalliyyât*). We cannot mention all existent works and books, but we will mention some important works.

2.1.15.1 Comparative and Contemporary Books on *Fiqh*

1. al-Zuhayli, Sheikh Wahba Mustafa (1932-). *Al-Fiqh al-Islâmî wa Adilatuhu (Islamic Jurisprudence and its Proofs)*. This is a very long summary of the different schools of Islamic Law and their debates on various legal questions. It has been translated into Turkish, Urdu, Malay, and Farisi, and is currently being translated into English; *al-Fiqh al-Islâmî 'ala Madhhab al-Mâlikî* (Islamic Law according to the Mâlikî

¹⁵² Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 135.

¹⁵³ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 136.

¹⁵⁴ Hawwa, *al-Madkhal ila Madhhab*, pp. 394-97.

madhhab).¹⁵⁵

2. Muhammad Abu Zahra (1898-1974). His more than forty books include biographies of *Abu Hanîfa*, *Imâm Mâlik*, *Shâfi'î*, *ibn Hanbal*, *Zaid ibn Ali*, *Ja'far as-Sâdiq*, *Zain al-Abidîn*, *ibn Hazm*, and *Ibn Taimiyya*, as well as works on personal status (*al-Ahwâl al-Shakhsiyyah*), pious endowments (*Muhâdarât fi al-Waqf*), property (*Haqq al-Milkiyyah*), and crime and punishment in Islamic Law (*al-Uqûbah*) and *Târikh al-Madhâhib al-Islâmiyyah*.¹⁵⁶

3. Al-Qaradawi, Yusuf (September 9, 1926). *Al-Halâl Wa'l-Harâm fi al-Islâm* (Translated into English as *The Lawful and Prohibited in Islam*); *Fiqh al-Zakâh* (in my view his most famous book) and *Fatâwâ Mu'asirah* in two volumes. The last book treats comparative and contemporary problems.¹⁵⁷

4. Mustafa Ahmad al-Zarqa (Aleppo, Syria, 1904-1999). *Al-Madkhal al-Fiqhi al-Âmil al-Fiqh al-Islâmî*, (A Comprehensive Introduction to Islamic Law), in three large volumes. This served as a textbook in faculties of Law and Sharî'ah for a long time. Written in modern, simple style, this book gives a thorough introduction to *Fiqh*, or Islamic jurisprudence, to law students who are unfamiliar with Islamic studies. Thus, it bridges the gap between traditional Islamic scholarship and modern university study;

¹⁵⁵ Dr. Professor Sheikh Wahba Mustafa al-Zuhayli (1932-) born in Dair Atiah, Syria is a prominent professor and Islamic scholar specializing in Islamic law and legal philosophy. He is also currently a preacher at Badr Mosque in Dair Atiah. He is the author of scores of books on Islamic and secular law, many of which have been translated to English. He is chairman of Islamic jurisprudence in the College of Sharia at Damascus University.

Dr. Zuhayli has written numerous extremely detailed works mostly about Islamic law and legal theory. In total, Dr. al-Zuhayli has written over one hundred and sixty books. Among them are: 1) *Âthâr al-Harb fi al-Fiqh al-Islâmî: Dirasa Muqarin* ("The Influences of War in Islamic Jurisprudence: A comparative study"). It has been translated into French. 2) *al-Fiqh al-Islâmî wa Adillatuha* ("Islamic Jurisprudence and its Proofs") a very long eight volume summary of the different schools of Islamic jurisprudence and their debates on various legal questions. It has been translated into Turkish, Urdu, Malay, and Farisi and is currently being translated into English. 3) *Usul al-Fiqh al-Islâmî* ("The Roots of Islamic Jurisprudence") a two volume treatise on Islamic legal theory and philosophy.

¹⁵⁶ Muhammad Abu Zahra (1898-1974) was a conservative Egyptian public intellectual, traditional scholar of Islamic law and author. He was educated at the Ahmadi Madrasa, the Madrasa al-Qada al-Shari and the Dar al-Ulûm. He taught at al-Azhar's faculty of theology and later, as professor of Islamic law at Cairo University. He also served as a member of al-Azhar's Academy of Islamic Research.

¹⁵⁷ Yusuf al-Qaradawi born (September 9, 1926) is an Egyptian Muslim scholar and preacher best known for his popular al-Jazeera program, *ash-Sharî'ah wal-Hayat* ("Sharî'ah and Life"), and IslamOnline (a website that he helped to found in 1997), where he offers opinions and religious edicts ("fatwâ") based on his interpretation of the Qur'an. He has also published some fifty books, including.

Al-'Uqûd al-Musammat fi al-Fiqh al-Islâmî.¹⁵⁸

5. Abd al-Qâdir Awdah (1906-1954). *Al-Tashrî' al-Jinai al-Islâmî Muqâranan bil-Qânûn al-Wadh'î*. This is a manual on Islamic penal law; *al-Mal Wa al-Hukm Fi al-Islam*.

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7. Akgündüz, Ahmed. *Ottoman Legal Codes and Their Analysis according to Islamic Law (Osmanli Qânûnnâmeleri)*, in twelve volumes and in Turkish. This work aims to present 764 legal codes in Ottoman State; *Shar'iyah Sijilleri* in two volumes with a committee. This is an exceptional guide to the practice of *Shar'ah* Law in Shar'iyah Courts; *Türk Hukuk Tarihi (Turkish Legal History)*, in two volumes; *Islam Hukukunda ve Osmanli Tatbikatında Vakıf Muessesesi; Mukayeseli Islam ve Osmanli Hukuku Kulliyâtı*.

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¹⁵⁸ Mustafa Ahmad al-Zarqa was born in Aleppo, Syria, in 1904 into a family with a long history of learning and Islamic scholarship. His father, Sheikh Ahmad al-Zarqa, was an Islamic scholar of distinction, while his grandfather, Sheikh Muhammad al-Zarqa, was recognized as one of the top *fiqh* scholars of the 19th century. Hence, it was not surprising that the young Mustafa should show the signs of great promise in his early years in the same field of scholarship. He was later to rank among the top ten Islamic scholars of the 20th century. Mustafa al-Zarqa died in Riyadh on 3 July 1999.

¹⁵⁹ Ömer Nasuhi Bilmen was born in 1882 in Erzurum. He is one of the most famous Muslim scholars in Turkey and was President of Religious Affairs. He has started to study at Ahmediye Medresesi form Abdürrezzak İlmî and Müderris Hüseyin Raki Muftî of Erzurum. He obtained *ijazah* (1908) in Istanbul from Tokatlı Şakir Efendi and graduated from Medreset'ül Kudhat. He was appointed Professor in Sahn Madrasah and Dar al-Shafaqa. He taught *Ilm al-Kalâm* and *fiqh* for many years at Islamic High College. He became President of Religious Affairs in 1960 and died on 13 October 1971. He wrote many books on *Tafsîr*, *fiqh* and *kalâm*.

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16. Zaidan, Abdulkarim. *Al-Madkhal Li Dirâsah al-Sharī'ah al-Islâmiyyah*. Baghdad: Matba'ah al-Ânî, 1977; *Ahkâm al-Zimmiyyîn wa al-Musta'manîn*, Beirut: 1967.

2.1.15.2 Comparative and Contemporary Books on Usûl al-Fiqh

1. Sheikh Wahba Mustafa al-Zuhayli, (1932-). *Usûl al-Fiqh al-Islâmî*, Beirut: Dâr al-fikr, 1996, 2 vols. (The Roots of Islamic Jurisprudence), a two-volume treatise on Islamic legal theory and philosophy.

2. Muhammad Abu Zahra, (1898-1974). *Usûl al-Fiqh*, Cairo: Dâr al-Fikr al-Arabî, d.n.

3. 'Abdul-Karim Zaidan, *al-Wajîz fi Usûl al-Fiqh*, Beirut: al-Risâlah, 1996.

4. 'Abd al-Wahhâb Khallâf, *'Ilm Usûl al-Fiqh*, Cairo.

5. Muhammad Bek al-Khudarî, *Usûl al-Fiqh*, Beirut: Dâr Ibn al-Hazm, 2003.

6. Muhammad Sallâm Medkûr, *Usûl al-Fiqh al-Islâmî*, Cairo: Dâr al-Nahdhah al-Arabiyyah, 1976.

7. Muhammad Hasan Hito, *al-Vajîz fi Usûl al-Tashrī' al-Islâmî*, Beirut: al-Risâlah, 1983.

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2. Al-Qaradawi, Yusuf (September 9, 1926). *Fatâwâ Mu'âsirah*. Beirut: al-Maktab al-Islâmî, 2000.

3. Al-Tabataba'î al-Hakîm, al-Sayyid Muhammad Sa'id, *Murshid al-Mughtaribîn*. 2001. This is a Shi'î book on *Fiqh al-Aqalliyât*.

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7. Al-Râfi'î, Sâlim ibn Abdulghanî. *Ahkâm al-Ahwâl al-Shakhsiyyah Lil-Muslimîn fi'l-Gharb*. Beirut: 1974.

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3. Al-Khuyî, al-Sayyid al-Musawî *Minhâc al-Sâlihîn*. Foundation of Khuyi, Iran 2000. It consists of two volumes: the first concerns *fatâwâ* on 'ibâdât and the second is on *Mu'âmalât*.

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2.2 Applied References

This category covers legal arrangements directly involving applied law, court decisions and archival documents. Let us look at these briefly as well:

¹⁶⁰ Laila al-Zwaini/Rudolph Peters, *A Bibliography of Islamic Law 1980-1993* (Leiden: Brill 1994); <http://www.muslimphilosophy.com/ip/is-biblio.htm#VII> (accessed 8.6.2009).

2.2.1 Shar'ıyyah Records

Shar'ıyyah records in the Ottoman State were preserved better than in other states of the Muslim world. There are 20,000 Shar'ıyyah Records books (*Sijillât-ı Shar'ıyyah*) for the Istanbul Shar'ıyyah Courts alone. Is this because of the existence of some laws, official decrees and orders concerning preserving and archiving Shar'ıyyah records?

In the light of the archival documents, we could say that the Ottoman State arranged policies and plans reinforced by laws, decrees and local orders to preserve the Shar'ıyyah records. The first law was a legal decree enacted by Sultan Bâyezid I (1389-1403), in which there were rules about writing and preserving legal documents and registrations by *Qâdhî* as well as the fees involved. This law stipulates: "In the time of Bâyezid I (1389-1403), it was ordered to the *Qâdhîs* of provinces that they should not only take fees on *hujjah* registrations (*hujjah akchasi*), on heritage distributions (*rasm-i qismah*) and other kinds of registrations (*sijil akchasi*), but should preserve these records as well. This was enacted as a law in 796/1394."¹⁶¹

The 49th article of Sultan Mehmed II's (1451-1481) Public Ottoman Legal Code concerns the Shar'ıyyah Records and their respective fees. It states: "Judges (*Qâdhîs*) should receive 32 *akcha* for any registration in the Shar'ıyyah records and for *hujjah* documents; and 12 *akcha* for giving one copy from these Shar'ıyyah records to the plaintiff and the defendant, and for signing any Shar'ıyyah record 12 *akcha*." This article presupposes that all the judges have to enter their official documents in the Shar'ıyyah Records and give copies to the parties involved if demanded or needed. In explaining the tasks of the judges, the main Ottoman Legal Codes mention, among other official tasks, entering Shar'ıyyah records and the judicial documents (*katb-i sijillât ve sukûk*).¹⁶²

After Mehmed II (1451-1481), new and independent legal guidelines about the registration of the Shar'ıyyah records were enacted by the Ottoman authorities. These legal guidelines were called the *Qânûnnâme-i Rusûm* (The Legal Code for the Shar'ıyyah Court Fees). One article from this code stated that, in early times, the fees for written judgment records were obtained – from the parties involved – in different amounts, according to the views of Muslim scholars. But at this time these fees were

¹⁶¹ Ahmed Akgündüz, Shari'ah Courts and Shari'ah Records: The Application of Islamic Law in the Ottoman State, *Islamic Law and Society*, Volume 16, Number 2, 2009, 202-230; *Qânûn-i Cedid*, MTM (Milli Tettebbular Mecmuası), I/326.

¹⁶² Ahmed Akgündüz, *Osmanlı Qânûnnâmeleri*, vol. I (Istanbul: OSAV, 1989), p. 331; *Qânûn-i Cedid*, MTM (Milli Tettebbular Mecmuası), II/541, The Süleymaniye Library, Turhan Valide Sultan, No. 326, p. 155/a.

determined in the following way: All parties have to pay 25 *akcha* to the Shar‘iyyah Courts for written documents about marriage contracts, Shar‘iyyah *hujjah*, transference testimonies and petitions, 20 *akcha* for the judge and 5 for the staff of the Shar‘iyyah court. Sixty-six *akcha* were paid for the written document of emancipation (*‘itqânâme*); fifty *akcha* for the judge, ten *akcha* for the deputy judge (*nâib*), and six *akcha* for the staff of the Shar‘iyyah court. Sixteen *akcha* was the price determined for the judge’s letters of appointments (*murâsala*), and eight *akcha* for all the legal cases that were registered into the Shari‘yyah Records as a *rasm-i sijil*; six *akcha* for the judge and two for the staff of the Shar‘iyyah court.¹⁶³

Could a judge be punished if he removed the book of the Shar‘iyyah Records or neglects registering any legal issues into the Shar‘iyyah Records? There are many articles on such issues in the Ottoman Legal Codes. In the Public Legal Code enacted by Bâyezid II, article 138 stipulates: *“If the judge resigned his judicial task and quitted his old task, he had to hand the Shar‘iyyah Records Book over to the next judge. If he leaves without handing it over, he may be punished, and/or accused and punished for harming the affairs of the people.”* In a legal code dated 1510, the 8th article settles the second issue and states: *“You, as a judge, should register the copy of these guidelines in the Shar‘iyyah records. Be careful you do not lose this book! Obey these rules every time! After examining this code, the emîn (The official preserver of the Shar‘iyyah records) has to preserve this document. Whoever becomes the emîn has to preserve the Shar‘iyyah Records.”*¹⁶⁴

After the *Tanzîmât* movement, new arrangements were established with respect to the writing and preservation of the *Shar‘iyyah* Records. The Solemn Instruction (*Ta‘lîmât al-Saniyyah*), dated 1296/1878, fixed the arrangements and the preservation procedures of the decrees (*i‘lâms*) and deeds (*hujjahs*) on more solid principles.

The decisions issued by *Qâdhîs* (judges) in the Seljuqids, Ayyubids, Mamlukids and especially in the Ottoman State and the minutes were recorded according to the dates in books called Records of *Qâdhîs*, in which *hujjahs* represent the minutes of the judge’s determination in certain legal case or dispute; *i‘lâms*, the copies of verdicts issued by *Qâdhîs*; *Ma‘rûdhs*, decrees and records related particularly to criminal law and rather public law; *fîrmans*, the written edicts by the sultan to *Qâdhîs* on certain issues. Among the documents mentioned could be found official statements by *Qâdhîs*, *muhtasibs* and *subashis* – executive officials of a sort – regarding all the branches of private law and criminal law, trial and financial law as well as certain administrative decisions in public law. In short, the records mentioned are the best and

¹⁶³ *Qânûnnâme* (Ottoman Legal Code), Istanbul University Library, Turkish Manuscripts, No. 1807, p. 68/a-b.

¹⁶⁴ Akgündüz, *Osmanlı Qânûnnâmeleri*, vol. II, p. 141.

most outstanding examples of applied theoretical law. Given the ones that are known and have been classified, there are 20,000 Books of Records in eighteen museums, chiefly in the Archives of *Sharī'ah* Records at the Istanbul Muftī's Office. Since there were *Qâdhīs* in each township, small town and subdistrict, the importance of the aforesaid legal sources can be easily perceived.¹⁶⁵

2.2.2 Books of *Fatâwâ* (Religious Opinions and Answers)

There is another kind of Islamic Law Digest that discusses the *ʿilm al-Fatâwâ* (the science of legal opinions or decisions). In Islam a *fatwâ* is a religious opinion on Islamic law issued by a Muslim scholar. In Islamic law all *fatwâs* are non-binding, whereas in some situation a *fatwâ* could be binding, depending on the status of the scholar. The works of this nature are also very numerous and are, for the most part, called *Fatâwâ* (Legal Opinions) with the name of their authors. Although they are called *Fatâwâ*, most also contain the rules of law as well as legal opinions.¹⁶⁶

Books of *Fatâwâ* are those works that are composed of the replies given to questions posed by people on legal issues they encountered in practical life. In earlier times, if no view had been uttered by the eminent jurists who founded the Hanafī school concerning a certain legal issue, the jurist who encountered such a problem would solve the problem on the basis of his personal view and such new issues were called *Wâqī'ât* or *fatâwâ*. Particularly during the Ottoman State, the replies given to legal issues by *Shaikh al-Islams*, who were regarded as the heads of the judicial institution and the class of *ilmiyyah* (sciences) during the period of their office were either collected by themselves or compiled by somebody else who was occupied with those question while the *Shaikh al-Islams* in question were still alive or after they had died into a great number of *Majmū'ah al-Fatâwâ* (Collections of *Fatwâs*). Decisions and minutes in the aforementioned *Sharī'ah* Records were kept in complete accord with *fatwâs*. For this reason they could – though not in the precise sense – be compared to decisions of the current Supreme Court of Appeal.¹⁶⁷

There are several collections of *fatâwâ*. From the collections of *fatwâs* that pio-

¹⁶⁵ For an example see *Beşiktaş Mahkemesi Sicili* (Records of Court of Beşiktaş), *Defter* (Book) No: 23/127; Baltacı Cahit, *Şer'îye Sicillerinin Tarihî ve Kültürel Önemi* (The Historical and Cultural Significance of Shariyyah Records), *Osmanlı Arşivleri ve Osmanlı Araştırmaları Sempozyumu* (A Symposium on Ottoman Archives and Ottoman Researches) (Istanbul: Basbakanlık, 1985), pp. 121 ff. Akgündüz/Board, *Şar'îye Sijilleri*, 1/1 ff.; Cf. Bogac A. Ergene, *Local Court, Provincial Society and Justice in the Ottoman Empire: Legal Practice and Dispute Resolution in Cankiri and Kastamonu (1652-1744)*, (Leiden: Brill, 2003), pp. 99-170.

¹⁶⁶ Sircar, *The Muhammadan Law*, p. 50.

¹⁶⁷ Akgündüz, *Osmanlı Qânûnnâmeleri*, vol. I, pp. 39ff; Mumcu and Üçok, *Türk Hukuk Tarihi Ders Kitabı*, p. 172; Sircar, *The Muhammadan Law*, p. 50.

neered the Ottoman history of law: the *fatâwâ* by Abu al-Su'ûd Effendi, the major two-volume work by Mantasizhâdah Abdurrahim Effendi called *Fatâwâ al-Abdurrahim Effendi* and the *Fatâwâ al-Fawdhîyyah* by Shaikh al-Islam Faizullah Effendi may be given as examples. Also, we should note here that several legal codifications were prepared through the incentives and sponsorship of some civil servants in Islamic Law and they were called *al-Fatâwâ*, which – one should bear in mind – were unlike those books of *fatâwâ* with which we are familiar but were a sort of *corpus juris*, which consisted of all the provisions of law. In actual fact, *al-Fatâwâ al-Hindiyyah* (prepared during the Babur Empire, 1556), which we will discuss later, and “*Fatâwâ al-Tatarkhâniyyah*” (prepared during the Chagatai State) were works of this type.¹⁶⁸

We should remember that the distinction between so-called *fatwâ* collections and works on law proper (*fiqh*), as the terms are used by the jurists, is often shadowy. Thus the term *fatwâ* collection is given to works like the ‘*Alamgîriyyah*’, which by no means answer questions about concrete actual cases but simply give the legal principles on particular points as determined in the first instance by early *fuqahâ* or as involved in existing *fatwâs* on actual cases. These principles, however, are still too general to be applied to actual cases without further interpretation. As it is, a work on *fatwâs* differs from a work on *fiqh* proper in that the latter, besides being somewhat less complete as to details, also indicates the motives and grounds, and is meant to furnish a more or less academic training whereby one might apply the law to new cases.

We ought also to remember here that when the Ottoman sultans demanded that one of the current views about a disputed matter be preferred, they definitely received a *Fatwâ-i Sharîfah* – again as it was called in Ottoman law – from the *Shaikh al-Islam*, and thus based the administrative and political acts they executed on Islamic law. One can find many examples of *fatwâ*-based verdicts in the Prime Ministerial Ottoman Archives. Again, the same method was followed in the *firman*s sent to *Qâdhîs*.¹⁶⁹

2.2.2.1 *Fatwâ* Collections of Hanafî School

1. *Kitâb al-Nawâzil*, by Abu al-Laith Nasr ibn Muhammad al-Samarqandi (376/986). Said to be the first work combining the legal determinations (*masâ'il*) of later *fuqahâ* (*mashâyikh*). The work also contains, under the heading ‘*Uyûn al-Masâil*’, legal opinions reported from early jurists (*ashâb*) that were not recorded in

¹⁶⁸ The Committee, *al-Fatâwâ al-Hindiyyah* (Beirut: Dâr al-Kutub al-Ilmiyyah, 1980), vol. I-VI; ‘Âlim ibn’Alâ, *Fatâwâ al-Tatarkhâniyyah* (Istanbul: Library of Istanbul Muftî’s Office, MS.); Akgündüz, *Kuliyât*, pp. 36-40.

¹⁶⁹ For ‘ilm *al-fatâwâ* see Tashkopruzadeh, *Miftâh al-Sa’âdah*, vol. II, pp. 557-59.

Zâhir al-Riwâyah or other sources.

2. *Majma' al-Nawâzil wa'l-Wâqi'ât* by Abu al-'Abbas Ahmed ibn Muhammad al-Nâtifi (446/1054). This is a work similar to the above.

3. *Al-Wâqi'ât* or *al-Wâqi'ât al-Husâmiyyah* by Husâm-al-Dîn (or Husâm) 'Umar ibn 'Abd-al-'Azîz ibn Mâzah al-Sadr al-Shahid al-Bukhârî (536/1141). It combines the two previous works with the *fatwâs* of Abu Bakr Muhammad ibn al-Fa'âl and the *Fatâwâ Ahl Samarqand*, indicating the sources by letters.¹⁷⁰

4. *Khulâsah al-Fatâwâ* by Tâhir ibn Ahmed Iftikhâr-al-Dîn al-Bukhârî (542/1147). This collection combines the *fatwâs* of later *mujtahids* and those of the founders. That is a select collection of great authority.¹⁷¹

5. *Dhakhîrah al-Fatâwâ* or *al-Dhakhîrah al-Burhâniyyah*, by Burhân-al-Dîn Mahmud ibn Ahmed ibn al-Sadr al-Shahid ibn Mazâh (570/1174). This is a highly esteemed work. ibn Mazâh is the author of the *Muhît al-Burhâni*.¹⁷²

6. *Fatâwây-i Qâdhîkhan*, also called *al-Khâniyyah*, by Fakhr-al-Dîn al-Hasan ibn Manaar al-Uzjandi al-Fargânî Qâdhîkhan (592/1195). This is a standard work of enduring reputation; *The Vade Mecum* of judges and *muftîs*. It is replete with cases that commonly occur, and is, therefore, of great practical use, more especially since many of the decisions are illustrated by proofs and the reasoning on which they are founded.¹⁷³

7. *Al-Tajnis wal-Mazî* by Burhân-al-dîn 'Ali ibn Abu Bakr al-Marginâni (593/1196). The author claims to have carried on the arrangement of al-Sadr al-Shahîd's work on *fatwâs* (apparently his *Wâqi'ât*) by classifying (*tartîb*), the particular opinions within the books (*kutub*) also and to have enlarged it with additions from other sources.¹⁷⁴

8. The two works called the *Fusûl al-Ustrushani* (by Muhammad ibn Muhammad al-Ustrushani (625/1227)) and *Fusûl al-Imâdiyyah* (by Abu al-Fath al-Marghinani (651/1253)) were incorporated into a collection called *Jâmi' al-Fusûlayn*, which is a work of some celebrity. It was compiled by Badr al-Dîn Muhammad, known as ibn al-Qâdhî Simawanah (800/1397). It deals with the practical part of *Mu'âmalât of fiqh* only and is used by judges in particular.¹⁷⁵

9. *Al-Fatâwâ al-Zâhiriyyah* by Zâhiruddîn Abu Bakr Muhammad ibn Ahmad al-

¹⁷⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 790.

¹⁷¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 551.

¹⁷² Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 621.

¹⁷³ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 218.

¹⁷⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 304.

¹⁷⁵ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, pp. 247, 251.

Bukhâri (619/1222).¹⁷⁶

10. *Qunyah al-Munyah* by Mukhtar ibn Mahmud al-Ghazmini (658/1259).¹⁷⁷

11. *Al-Fatâwâ al-Walwâliyyah* by Abu al-Makârim Zahîr-al-Dîn Ishaq ibn Abu Bakr al-Walwâliji (710/1310). It is condensed from the *fatwâs* of Husâm al-Shahid, with additions.¹⁷⁸

12. *Khizânah al-Muftiyyîn*, by Imâm Husain ibn Muhammad al-Sam'ani (740/1339).¹⁷⁹

13. *Khizânah al-Fatâwâ*, by Ahmad ibn Muhammad al-Hanafî.¹⁸⁰

14. *Al-Fatâwâ al-Tatarkhâniyyah*, by 'Âlim (al-A'lam) ibn Alâ'-al-Dîn (about 800/1397). This is a great work combining the *Muhît al-Burhâni*, the *Dhakhîrah*, the *Khâniyyah* and the *Zâhiriyyah*, with an introduction on science (*ilm*). It is arranged according to the chapters of the *Hidâyah*. Written by order of the ruler *Tâtarkhân*; hence the name. A selection was later made from these *fatâwâ* by Imâm Ibrahim al-Halabi (956/1549).¹⁸¹

15. *Al-Fatâwâ al-Bazzâziyyah* or *al-Jâmi' al-Wajîz* or *Fatâwâ al-Kardari* by Muhammad ibn Muhammad al-Bazzâzi al-Kardari (827/1423). It contains the "cream" of previous works and many rely on it.¹⁸²

16. *Al-Fatâwâ al-Zayniyyah* is in reality essays on matters of practical interest (such as the status of the countries of Egypt, *istishâb*, land concessions, *Kharâdj*, etc.) by Zayn-al-'âbidîn ibn Ibrahim ibn Nujaym al-Misri (970/1562) as collected and arranged by his son 'Abdullah, with additions.¹⁸³

17. *Fatâwâ Abu al-Su'ûd*, by 'Abdullah al-Su'ûd Muhammad ibn Muhammad al-'Imâdi (983/1575), in Turkish. Al-'Imâdi lived during the reign of Sultan Sulaiman the Magnificent. His *fatwâs* throw light on the adaptation of *Shari'ah* to practical requirements, particularly as regards land. A collection of the same by Wali al-Iskilîbi Weli Yekân, also containing *fatwâs* by others, is current.¹⁸⁴

14. *Mugnî al-Mustaftî 'an Su'âl al-Muftî* (or *al-Fatâwâ al-Hâmidiyyah*), by Hâmid Efendi ibn Muhammad al-Qonawi (985/1577). This is a practical work but too long. An

¹⁷⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 217.

¹⁷⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 316.

¹⁷⁸ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 220.

¹⁷⁹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 540.

¹⁸⁰ Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 540.

¹⁸¹ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 214; vol. I, p. 253.

¹⁸² Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 214; vol. I, p. 235.

¹⁸³ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 215.

¹⁸⁴ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 212.

extract with modifications is *al-'Uqûd al-Durriyyah fi Tanqîh al-Fatâwâ al-Hâmidiyyah*, by Muhammad Amin ibn 'Abidîn (1258/1842). Ibn 'Abidîn draws on his previous works, such as the *Radd al-Muhtâr*, *Minhah al-Khâliq*, and essays (*Rasâ'il*). This is a useful work, in question-and-answer form.

16. *Al-Fatâwâ al-Anqarawi*, by Shaykh-al-Islam Muhammad ibn Husain al-Anqarawi (1098/1686). It gives most of the accepted decisions and is relied upon by *fuqahâ* and jurists.

17. *Fatâwâ 'Ali Effendi*, by Shaykh-al-Islam 'Ali Efendi Jatiljawi (1103/1692). In Turkish, well known; consists of actual *fatwâs*. It contains the arguments derived later by Sâlih ibn Ahmed al-Kaffawi from the Arabic sources. The *Al-Fatâwâ al-Faydhiyyah* by Shaykh-al-Islam Faydallah Efendi was printed in the margin.

18. *Al-Fatâwâ al-'Âlemgiriyyah*, compiled on the orders of Sultan Muhyi-al-Dîn 'Alamgir Ewrengzib (ruled from 1069-1118/1659-1706) by a committee chaired by Shaykh Nizâm. The work is meant to be exhaustive and to dispense with the need to refer to other *fatwâ* collections. It enjoys the highest esteem in India. This book, with opinions and perceptions of Islamic Law, contains an immense number of law cases. Because of its comprehensive nature, this work is applicable to almost every case that arises involving points of Hanafî doctrines.

19. *Fatâwâ 'Abd-al-rahim*, by Shaykh-al-Islam Menteshizâdeh 'Abdal-rahim Efendi al-Bursawi (1128/1716). An esteemed large collection in Turkish; contains many *fatwâs* on modern matters such as agrarian relations.¹⁸⁵

2.2.2.2 *Fatwâ* Collections of the Shâfi'î School

1. *Fatâwâ ibn al-Salâh* by 'Uthman ibn 'Abdurrahman ibn al-Salâh (642/1244), collected by his disciples. It is very useful.¹⁸⁶

2. *'Uyûn al-Masâ'il al-Muhimmah* by Yahya ibn Sharaf al-Nawawi (676/1277), in two sizes. It provides answers to actual cases.¹⁸⁷

3. *Fatâwâ al-Zarkashi* by Badr-al-Dîn Muhammad ibn Bahâdur al-Misri al-Zarkashi (794/1392).¹⁸⁸

4. *Al-Fatâwâ al-Kubrâ al-Haythamiyyah al-Fiqhiyyah* by Ahmed ibn Muhammad

¹⁸⁵ Hawwa, *al-Madkhal ila Madhhab*, pp. 375-83; Sircar, *The Muhammadan Law*, pp. 50-56; Aghnides, *Islamic Theories of Finance*, pp. 184-86.

¹⁸⁶ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 212.

¹⁸⁷ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 187.

¹⁸⁸ Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 215.

ibn Hajar (973/1565). It answers actual questions with extended arguments.¹⁸⁹

2.2.2.3 *Fatwâ* Collections of the Mâlikî School

1. *Al-Mi'yâr al-Mughrib wa'l-Jâmi' al-Mu'rib 'an Fatâwi A'lâm Ifriqiyah wa'l-Andalus wa'l-Maghrib* by Ahmed ibn Yahya al-Wansharisi (914/1508).

2. *Fath al-'Ali al-Mâlik fi'l-Fatwâ 'ala Madhhab al-Imâm Mâlik*, by Abu Abdullah Muhammad ibn Ahmed 'Alish (1299/1882). The *fatwâs* given by the author are arranged according to the conventional fiqh book chapters.¹⁹⁰

2.2.3 *Archival Documents*

By archival documents we should think first of those documents that are found in the Prime Ministerial Ottoman Archives, particularly in Istanbul. The documents in the Ottoman Archives, the number of which is estimated at approximately 170 million, are actually the concrete evidence that certifies whether the services executed by the Ottoman State were in conformity with Islamic law. Moreover, the most significant example of the application of the Islamic law, particularly in reference to administrative and constitutional law, general international law and financial law, are found in these archives. As a matter of fact, after the *Tanzîmât* (Reforms), the aforesaid archives became the primary references for Islamic law, for the originals of the legal arrangements pertaining to each branch of post-*Tanzîmât* legislation along with the rationale thereof and other related documents are stored there.

We can conclude that any study carried out on Islamic Law without any reference to these archives is definitely deficient. Likewise, any research carried out on the Ottoman legal system solely on the basis of archive documents without referring to the essential works related to Islamic Law will be also defective, for the aforesaid two references complement each other. We will now provide some brief information on the archival documents that are of such great significance.¹⁹¹ Documentary sources will give us more detailed information on and deeper insight into the operation of the legal system. They exist in great quantity in the Ottoman Archives where we find a

¹⁸⁹ Sircar, *The Muhammadan Law*, p. 50; Aghnides, *Islamic Theories of Finance*, p. 190.

¹⁹⁰ Aghnides, *Islamic Theories of Finance*, p. 194.

¹⁹¹ Necati Aktaş and Binark İsmet, *Al-Arshif al-Uthmânî* (Ottoman Archives) (Amman: IRCICA, 1986), pp. 3ff; Atilla Çetin, *Başbakanlık Arşivi Kılavuzu* (Manual of Prime Ministerial Archives), (Istanbul: Başbakanlık Osmanlı Arşivi, 1979), pp. 5-6; Nejat Göyünç, *Osmanlı Araştırmalarında Arşivlerin Yeri* (Place of Archives in Ottoman Researches), *Arşiv Sempozyumu* (Archives Symposium), pp. 53ff; Halil İnalçık, *Osmanlı Arşivlerinin Türk ve Dünya Tarihi için Önemi* (The Importance of the Ottoman Archives for the History of Turkey and the World), *Arşiv Sempozyumu* (Archives Symposium), pp. 31 ff; Akgündüz, *Osmanlı Kanunnameleri*, 9 vols.

wealth of judicial records going back to the sixteenth century.¹⁹²

Because we will provide information on the post-*Tanzîmât* legal arrangements later, we wish to focus here on the pre-*Tanzîmât* archival documents, among which we should take the following documents into consideration for they are very closely related to Islamic Law.

a) **Muhimmah Books (*Dafâtir-i Muhimmah*)**. These are the books that are kept with the *Dîwân al-Humayûn* (Imperial Council), which was the executive body of the Ottoman State. They were the records of the outstanding decrees and *firman*s that were issued regarding all the affairs of the state. These 263 *Muhimmah* books found in the Prime Ministerial Ottoman Archives for the periods 961-1323/1553-1905 are the books that contain the important administrative, judicial and political acts of the Ottoman State.¹⁹³

b) **Legal Codes in Title-Deed Registry Books (Ottoman *Qânûnnamas* in *Dafâtir-i Tapu and Tahrîr*)**. Those countries that were annexed to the Ottoman State, the area of which was very vast, were registered by the appointed boards, on the basis of which the records of the country and properties were regularly kept. In that respect, the aforesaid books kept by officials that were called *Muharrir* or *Il-Yaziji* were called Title Deed Registry Books or *Quyûd al-Khâqâniyyah* (Imperial Records). The ones that showed the administrative organization and population and also gave detailed information were called *Mufasssal* (Detailed) while those that consisted of briefer information were called *Mujmal*, at first, especially those to which those legal codes were added that consisted of the financial and legal essentials of the countries in question. The features of the order of a civilization that earned all its wealth from the soil and the principles on which the legal and financial regulations were based that illuminates the social and economic structure of the Ottoman State were actually compiled in these legal codes. The oldest of the Title Deed Registry Books, in which legal codes are found that, are the most significant references for Ottoman financial law and land law, dates back to the era of Murad II, totaling 1094 books. What is more, there are 250 of the aforesaid books in the Archives of the General Directorate of Land Registry and Cadastre of Ankara.¹⁹⁴

¹⁹² Cf. Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*, (Cambridge: Cambridge University Press, 2005), pp. 187-88.

¹⁹³ Çetin, *Başbakanlık Arşivi Kılavuzu*, pp. 49ff; Aktaş and Binark, *Al-Arshif al-Uthmânî*, pp. 133ff.

¹⁹⁴ Çetin, *Başbakanlık Arşivi Kılavuzu*, pp. 83 ff; Aktaş and Binark, *Al-Arshif al-Uthmânî*, pp. 329 ff; Ahmad Akgündüz, *Osmanlı Qânûnnâmeleri ve Hukukî Tahlilleri* (Istanbul: OSAV, 1989-1994), vo. I-IX; Ömer Lütfi Barkan, *XV ve XVI. Asırlarda Osmanlı İmparatorluğunda Ziraî Ekonominin Hukukî ve Malî Esastarı* (Legal and Financial Principles of Agricultural Economy in the Ottoman State in the XV and XVI. Centuries) (Istanbul: Introduction, 1943), pp. Vff; Anton Minkov, "Ottoman Tapu Title Deeds in

c) On the other hand, the other archive references, apart from the aforementioned, are closely related to Islamic law. Although Books of *Majlis 'Âli-i Tanzîmât* (Assembly of *Tanzîmât*), Books of *Nizâmât* and especially the Files of Codes could be mentioned among the most important of these, since 80% of them were published in periodicals, we will not go into further detail. Nevertheless, we cannot omit mention of the forty-volume work called *Kullîyât al-Qawânin* (A Collection of Laws) by Serkiz Karakoç, who wrote valuable works on the history of the Ottoman laws, in which he intended to collect the legal arrangements between 1514 and 1914. The work is a perfect reference work for the period after 1247/1831.¹⁹⁵

We should remember here that some parts of Ottoman documents are present in archives in different Muslim countries, such as Egypt, Damascus and Tunisia.

2.2.4 Legal Arrangements and Judicial Decrees (*Qawânîn*)

Legal arrangements or legal codes that are the most important sources of Islamic law should be perceived here broadly as a collection of judicial decisions that have been compiled by an official person or board in which sense the first legal arrangement on hand is a legal code on private law called *al-Masâil al-Mâlikshâhiyah Fil-Qawa'id al-Shar'iyah*, which was prepared by the Seljuqid sultan Malikshah in (485/1092),¹⁹⁶ and was followed later by *Fatâwâ al-Tatarkhâniyyah*. But we should not forget Nizâm al-Mulk who prepared his voluminous treatise on kingship called *Siyâsatnâmah* (The Book of Government). His full name was Abu 'Ali al-Hasan al-Tusi Nizâm al-Mulk (1018 – 14 October 1092) and he was a celebrated scholar and vizier of the Seljuq Empire.¹⁹⁷

After this, the earliest codification of Muslims is that of Temur, also called Emîr Timur or Amir Temur (1336/1405), among his other names, commonly called Tamerlane or Timur the Lame. He was a 14th century Turco-Mongol conqueror of much of western and central Asia and the founder of the Timurid Empire and the Timurid dynasty (1370–1405) in Central Asia, which survived until 1857 as the Mughal dynasty of India. He ordered Mir Sayyid Sharîf, one of the great '*ulamâ*, to prepare and administer legislation or *qânûn*, and Sayyid Sharîf declared Timur the innovator of the four-

the Eighteenth and Nineteenth Centuries: Origin, Typology and Diplomats," *Islamic Law and Society*, Volume 7, Number 1, 2000, pp. 65-101(37).

¹⁹⁵ The work is in the Library of Turkish History Institute as a manuscript. The first volume of the chronological index has been edited by Ahmet Akgündüz, who also provided an introduction.

¹⁹⁶ The Committee, *al-Urâdah Fi'l-Hikayah al-Saljuqiyyah* (Istanbul: MTM), vol.2, pp. 249ff.

¹⁹⁷ Muhammad Al-Buraey, *Administrative Development: an Islamic Perspective*, (Taylor & Francis, 2002), p. 280.

teenth century. We can compare his *Tuzukât-i Timur* (Decrees of Timur)¹⁹⁸ with the *Qânûn-i Umumî* of Muhammad the Conqueror.

It was during his reign that the *Memoirs* and *Institutes* (*Malfûzât* and *Tuzukât*) of Temür first appeared in Persian. These two works were supposed to have been dictated originally by Temur himself. The *Memoirs* are a retelling of Temur's life, differing from the standard earlier histories in a few facts, and most importantly, reinforcing the emphasis on Temur's personality and youth. The *Institutes* are a mirror for princes and present Temur's policies of rule as models. They were presented to Shah Jahan in 1637 by Abu Tâlib Husayni. Both the *Memoirs* and the *Institutes* remained popular in India, Central Asia and the Middle East into the nineteenth century. Most twentieth-century scholars have judged these works to be seventeenth-century productions designed for use in the Mughal court.¹⁹⁹

We should mention here the role of Aurangzeb (al-Sultan al-Azam wal Khâqân al-Mukarram Abul Muzaffar Muhiuddîn Muhammad Aurangzeb Bahadur Alamgir I, Padi-shah Ghazi) (1618 - 1707), also known by his chosen imperial title Alamgir I (Conqueror of the Universe). He was the ruler, the sixth, of the Mughal Empire from 1658 until his death. His name literally means "Adorning the Crown." He espoused an interpretation of Islam and a behavior based on the *Sharî'ah*, which he set about codifying through edicts and policies. Aurangzeb took a personal interest in the compilation of the *Fatâwâ-e-Alamgiri* or *Fatâwâ Hindiyyah*, a digest of Islamic law. Aurangzeb began to enact and enforce a series of edicts with punishments. Most significantly, Aurangzeb initiated laws that interfered with non-Muslim worship. The *qânûn* of Aurangzeb is very important as a *qânûn* of Sultan Sulayman. He enacted *Ta'zirât* about *ta'zîr* crimes and administrative issues like a *Qânûnnâme* in the Ottoman State. This *Ta'zirat* has been translated into Persian, together with the *Fatâwâ-e-Alamgiri* by Qâdhî al-Quzat Muhammad Najmuddîn Khan in the year 1813.²⁰⁰

On the other hand, legislations that started in the era of the Anatolian Seljuqids and continued in the Ottoman State were the essential legal arrangements that were taken as the official basis at the courts and at the other state offices, including those legal codes of Fâtih (the Conqueror), Qânûni (the Lawmaker), Tawqî'i Abdurrahman Pasha (1087/1676), Ahmed the Third and Murad the Fourth should certainly not be

¹⁹⁸ *Tuzukat-e Timuri*, Persian version provided by Abu-Tâlib Huseini (Oxford, 1773), pp. 18-20.

¹⁹⁹ Forbes Manz, "Tamerlane's Career and Its Uses," *Journal of World History* 13 (2002): 1-25; Major Davy, *Institutes, Political and Military, written originally in the Mongol Language, by the great Timour*, (Oxford, 1783); Charles Stewart, *The Malfuzat Timury, or Autobiographical Memoirs of the Moghul Emperor Timur*, (London, 1830).

²⁰⁰ Sircar, *The Muhammadan Law*, pp. 55-57; Ishwari Prasad, *A Short History of Muslim Rule in India, from the Advent of Islam to the Death of Aurangzeb* (Allahabad : Indian Press, 1965), p. 609; John F. Richards, *The Mughal Empire* (Cambridge: Cambridge University Press, 1995).

overlooked. In point of fact, these legislations and the books of Islamic jurisprudence (*Qânûnnâme*, *Qawânîn*) were accepted as the written legal codes of the Ottoman State until *Tanzîmât* (The Reforms). While books of Islamic jurisprudence were the references for *Sharî'ah* law, the legal codes were the references for the customary laws that were based on *Sharî'ah* principles. In truth, they also served as the basis of those legal arrangements that emerged as result of the codification movements after *Tanzîmât* (Reforms).²⁰¹

The Ottoman legal codes before *Tanzîmât* could be classified into two groups:

A) The **first** was the General legal codes known as *Qânûn al-'Uthmani* (Ottoman Law). Mehmed II (1451-81) was the first of the sultans to issue *qânûnnâme* intended to be of universal application. One of the two *qânûnnâmes* for him deals with organization of offices connected with the state, with posts held by 'ulamâ as well as those held by the more obvious men of government, such as *wazîrs*. Second one, chiefly concerned with fines, taxes and tolls, was later subsumed in the much more comprehensive *qânûnnâme-i 'Uthmânî* or *Qânûnnâme-i Âl-i 'Uthmân*. Yavuz further extended that law and then published it. *Qânûn al-'Uthmani* (The Ottoman Law), which was prepared during the reign of the Lawmaker, remained in force until after *Tanzîmât*, except for several minute amendments during the time of Murad IV and Ahmed I. General laws are made up, basically, of decrees concerning *ta'zir* penalties, then the states of *ra'âyâ* (Muslim and non-Muslim subjects) and the taxes for which they were liable as well as those issues for which military organizations and similar supervisors were vested with legislative prerogative. The system of *timar* (fief) was also detailed in it.²⁰²

B) The **second** was the Special legal codes on provinces – around 35 – and the *sanjaqs* (principalities) affiliated with these provinces. They were the forms of the general Ottoman laws that were adapted to local conditions and numbered about 700. They regulated military, penal, agricultural and administrative principles apart from the issues of customs and *bâj*.²⁰³

The most important source of post-*Tanzîmât* legal texts and arrangements that is laws, regulations, directives and decrees were primary and secondary *Dustûrs* (Codes of Law). Besides, *Taqwîm al-Wakâyi'*, the first Official Gazette of the Ottoman State

²⁰¹ The Committee, *Osmanlı Qânûnnâmeleri* (Ottoman Legislations), MTM, vol. I, pp. 49, 305, 479ff; Serkez Karakoç, *Külliyât-ı Qavânîn* (A Collection of Laws), File No. 1, "Legislations of the Conqueror, the Lawmaker, Ahmed III and Murad IV"; cf. Akgündüz, *Osmanlı Kanunnameleri*, 9 vols.

²⁰² Cf. Richard C. Repp, "Qânûn and Sahr'a in the Ottoman Context," 'Azîz 'Azmah, *Islamic Law*, pp. 125-26.

²⁰³ Old Ottoman Legal Codes, which Ahmet Akgündüz has begun to have been published. See *Osmanlı Kanunnameleri ve Hukukî Tahlilleri*, vol. I, (Istanbul: OSAV, 1990).

that began to be published from 1247/1831 on, *Jaridah al-Mahâkim* and *Majmû'ah al-Muqarrarât al-Tamyîziyyah*, in which the decisions of the Supreme Court of Appeal were published and periodicals on legal issues such as *Jaridah al-Adâlah* (Journal of Justice) and *Jaridah al-Ilmiyyah* (Journal of Islamic Science) are of crucial significance. With respect to legal arrangements we should make particular mention of Penal Codes.

We should mention that laws were published on various subjects with the proclamation of *Tanzîmât* in 1839 by the Government under the title of *dustûr* (codex) and were translated into foreign languages. These codes include laws, interpretations and decrees enacted by the legislative power, as well as the regulations, contracts and the like which were prepared by authorized offices in conformity with the provisions imposed by laws, interpretations and decrees.

The *dustûr* was codified in three series.

1) The first series contained the texts previous to 1324/1906. It comprised eight volumes, four of which were appendices. It contains the laws and decrees up 1302 though it is incomplete. Laws from 1302 to 1324/1906 were not compiled and printed in the form of a *dustûr*. The compilation entitled *Mutammim* (Addenda) contains only a part of these.

2) The second series of *dustûr* contains all judicial texts from 1324/1906 to 1336/1918. Of this series, seven volumes were published at that time, containing texts up the year 1331/1912, but the part which went up to 1338/1919 was printed later in five volumes.

3) The third series of *dustûr* contains in full all laws promulgated by the Grand National Assembly and all governmental decrees of the Turkish republic in thirty-three volumes.

Laws codified before the Constitution of 1293/1876 were submitted by the Government of his Imperial Majesty for approval and were enforced by His Majesty's decree. Laws after this date were enacted by the Parliament in accordance with provisions of the Constitution.²⁰⁴

The codifications of Islamic law in the modern meaning started again with *Majalla*, which arranged the laws of property, loans and procedures: *Majalla-i Ahkâm-i 'Adliyyah*. This was an official Ottoman codification of Hanafite law by a special committee (*Majalla Jam'iyeti*) under the chairmanship of Ahmed Jawdat Pasha. It represents the last stage in the development of Hanafite doctrines. The committee's report is

²⁰⁴ Abu al-Ula Mardin, "Development of the Sharia under the Ottoman Empire," Majid Khadduri and Herbert J. Liebesny, *Origin and Development of Islamic Law; Law in the Middle East*, (Clark: The Lawbook Exchange, Ltd., 2008), pp. 290-91.

worth reading. The most important commentary was *Durar al-Hukkâm Sharh Majalla al-Ahkâm*, by Khoja Emin Efendi Zadeh 'Ali Haydar, which was published in Constantinople, 1330, vols 1-4 (in Turkish). It is the best and most scholarly work of its kind and is used as text at the Istanbul Law School and by lawyers and judges.²⁰⁵

Last but not least, there are a great number of references in post-Islamic history of law. The aim is to reach a sound synthesis through a close study of all the references. We will try to accomplish this task on the basis of the most noteworthy of theoretical and applied references. In the meantime, we will learn that most of our knowledge of old Islamic Law is either incorrect or unfounded and that there is much of which we are ignorant.

We should mention some legislative activities in Egypt too. Egypt was under the rule of Ottoman State, but after Muhammad 'Ali Pasha it became a semi-independent state. The Ahmad Jawdat Pasha of Egypt, Muhammad Qadri Pasha, prepared three very important bills; but none of them became law officially. The *first* bill was *al-Ahkâm al-Shar'iyyah fi al-Ahwâl al-Shakhsiyyah*.²⁰⁶ The translation of the code was published as *Code of Mohammedan Personal Law* by (Sir) Wasey Sterry and N. Abcarius, printed by the Sudan Government in London 1914. The *second* bill was *Murshid al-Hayrân ila Ma'rifah Ahwâl al-Insân fil-Mu'âmalât al-Shar'iyyah*,²⁰⁷ and the third was *Qânûn al-'Adl wal-Insâf lil-Kadhâ' 'ala Mushkilât al-Awakf*.²⁰⁸ At the same time a Shi'î scholar, 'Abd al-Karim al-Hillî, prepared a bill called *al-Ahkâm al-Ja'fariyya fil-Ahwâl al-Shakhsiyyah* and published in Baghdad 1342/1923-24. This is a private codification of Twelver Shi'ite law, inspired by Qadri Pasha.

²⁰⁵ Cf. Siddik Sami Onar, "The Majalla," Majid Khadduri and Herbert J. Liebesny, *Origin and Development of Islamic Law; Law in the Middle East*, (Clark: The Lawbook Exchange, Ltd., 2008), pp. 292ff.

²⁰⁶ Official French translation: *Droit musulman: Du statut personnel et des successions d'après le rite hanafite* (Alexandria : 1875); official Italian translation: Alexandria : 1875; French translation also in E. Clavel, *Droit musulman: Du statut personnel et des successions* (Paris: 1895), vol. II, 261-424; Arabic text and English translation also in A.F. Muhammad Abdur Rasman, *Institutes of Mussalman Law* (Calcutta: 1907); commentary by Muhammad Zaid al-Ibyâni Bey, *Sharh al-Ahkâm al-Shar'iyya*, 3 vols. (Cairo: 1914).

²⁰⁷ Translated into French in *Droit musulman as Statut réel, traduit de l'arabe* by Abdul Azîz Kahil Bey (Cairo: 1893); cf. Akgunduz, *Külliyât*.

²⁰⁸ Translated into French as *Du wakf, traduit de l'arabe* by Abdul Azîz Kahil Bey (Cairo: 1896), and U. Pace and V. Sistro, *Code annoté du wakf*, (Alexandria: 1946).

3 THE HISTORICAL PERIODS OF ISLAMIC LAW

3.1 The Period of the Prophet Muhammad

3.1.1 *Legislation during the Period of Muhammad and Sources of Law*

The period of Muhammad is called *Asr al-Sa'âdah* (The Age of Felicity) by Muslim scholars. We should draw attention to primarily two points.

First, prior to Muhammad, the Arabian Peninsula had no written legal system or political order. Indeed, the political system known in Yemen, as well as any other political system – whatever the term may mean or may have meant to the civilized peoples of old – was literally unknown in the areas of Tihamah, Hijaz, Najd and other broad areas that constitute the Arabian Peninsula. The sons of the desert were then, nomads who had no taste for settled life and knew no kind of permanence other than perpetual movement in search of pasture and satisfaction of the whim of the moment. In the desert, the basic unit of life is the tribe and not the state. Moreover, a tribe that is always on the move does not recognize any universal law, nor does it ever submit to any general political order. To the nomad, nothing that falls short of total freedom for the individual, the family and the tribe as a whole is acceptable. So we could say that there was no written legal system in Arabian Peninsula. There were, however, some customary laws or rules relating especially to family law and penal law. We could conclude that pre-Islamic Arab customary law was one of the secondary sources of Islamic law, as we will explain in *'urf* and *'âdah*.¹ The best example of this is the law of *qasâmah* (compurgation). That means if a body of a murdered person is found on land owned by a tribe or in a city quarter or domicile, fifty of the inhabitants are to take an oath that they neither committed the crime nor have knowledge of the murderer. By doing so, they exempt themselves of any liability but are not exempt from paying *diyyah* (blood money) to the family of the victim.²

Second, we should separate the Meccan period (609-622) and the Medinan period (622-632) with respect to rules concerning Islamic law. The revelation in Mecca

¹ Ali Muhammad al-Mu'awwadh and Âdil Ahmad Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vols. I-II, (Beirut: Dâr al-Maktabah al-Ilmiyyah, 2000), vol. I, pp. 173-83; Cf. Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnî Usûl al-Fiqh*, (Cambridge: Cambridge University Press, 1997), p. 7.

² Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 205-21; Muhammad ibn Hazm, *Mu'jam al-Fiqh*, vol. II (Damascus, Jâmi'atu Dimashq, 1966), p. 838-39; Mannâ' al-Qattân, *Târikh al-Tashrî' al-Islamî* (Beirut: al-Risâlah, 1987), pp. 29-34.

was different from the revelation in Medina. The revelation in Mecca primarily concerned with basic faith principles like *tawhîd* (Allah's existence and unity), the next life (the hereafter), the ancient people, *Salâh* (the only rule revealed in Mecca) and some challenges. But the revelation in Medina mostly concerned the legal system, relations with the people of the book, hypocrites and international law like *jihâd*. During the second year of the *Hijrah*, the Prophet Muhammad drew up the Constitution of Medina (*wathîqah al-Madina*), defining relations between the various groups in the first Islamic community. Later generations of Islamic political thinkers paid a great deal of attention to the constitution, for Muslims believe that Muhammad created the ideal Islamic society in Medina, providing a model for all later generations. It was a society in which the integration of tribal groups and various social and economic classes was based on social justice. We could say that before migrating to Medina, Muhammad's mission was religious and ethical, calling people to humility, generosity and belief in God. But in the Medina period Qur'anic revelation began to reflect a new development in Islamic law.³

'Abdullahi Ahmed An-Na'im⁴ claims that the Meccan *sûrahs* of the Qur'an (revealed prior to *hijrah* or before the Prophet had any political power) are a universal message valid for all times and peoples while the Medinan *sûrahs* (revealed while the Prophet was a political leader) were directed specifically to that particular time and place and those specifics are not necessarily binding for other times and places. These claims are completely baseless.⁵ No Muslim can accept this claim.⁶ *Sharî'ah* is the law of Islam deduced from basic sources: the Qur'an-which Muslims believe to be the final

³ Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, (Cambridge: Cambridge University Press, 2007), pp. 19-21.

⁴ Abdullahi Ahmed An-Na'im is Charles Howard Candler Professor of Law at Emory University School of Law. His specialties include human rights in Islam and cross-cultural issues in human rights, and he is the director of the Religion and Human Rights Program at Emory. He also participates in Emory's Center for the Study of Law and Religion. An-Naim was formerly the Executive Director of the African Bureau of Human Rights Watch. He argues for a synergy and interdependence between human rights, religion and secularism, instead of a dichotomy and incompatibility between them. Born in 1950, An-Naim is originally from Sudan, where he was greatly influenced by the Islamic reform movement of Mahmoud Mohamed Taha. He is a naturalized American citizen, but retains Sudanese citizenship. His research interests include constitutionalism in Islamic and African countries, and Islam and politics. He directs several research projects that focus on advocacy strategies for reform through internal cultural transformation.

⁵ Some of 'Abdullahi Ahmed An-Na'im's works are: *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1996), *Islam and the Secular State: Negotiating the Future of Sharî'ah* (Cambridge, MA and London: Harvard University Press, 2008), *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002).

⁶ Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 59-84.

and literal Word of God, and the living example of the Prophet Himself. *Sharī'ah* is very broad and comprehensive. It includes worship rituals, i.e. how to pray, cleanliness for worship, how to fast and rules for social etiquette, i.e. how to dress and how to wash. There is no inconsistency between these rituals, questions of human rights and universal legal norms and values.

There were two sources for Islamic law in the period of the Prophet:⁷

1) The Qur'an is considered to be the word of God received by the Prophet and uttered verbatim by him to those around him. Moreover, there is a subtle and profound relationship between Muhammad and the Qur'an. *First*, there are direct references in the Qur'an to Muhammad, his nature and his function. Notably, the Qur'an declares that he was a man and not a divine being, that he was the "seal of prophets" (*khâtam al-anbiyâ'*), that he was endowed with a most exalted character, and that God had appointed him to be the "goodly model" (*uswah hasanah*) for Muslims to follow. *Second*, Muhammad was the person who comprehended the meaning of the Qur'an best and was its first interpreter and commentator. Over the centuries all Muslims have understood the Qur'an through Muhammad's interpretation, and whenever they recite the Qur'an or attempt to put its teachings into practice, they experience his presence. Islamic sages over the ages have, in fact, insisted that God granted to the Prophet alone the understanding of all levels of the Qur'an's meaning that humans could grasp, and that those who later came to know something of the inner meaning of the Qur'an were heirs to the knowledge given to Muhammad by God.⁸

2) The deeds of the Prophet, called the *Sunnah* – which technically also embrace his sayings, or *hadîths* – are, after the Qur'an, the most important source of everything Islamic, from law to art and from economics to metaphysics, and are the model of behavior that all pious Muslims seek to emulate. The *Sunnah* also covers a broad array of activities and beliefs, ranging from entering a mosque, practicing personal hygiene, and dealing with family to the most sublime mystical questions involving the love between humans and God. In addition, it addresses everyday activities; intimate matters of one's personal life as well as the social and economic life of Muslims have been governed over the centuries by the *Sunnah*. Even the details of all the major rites of the religion – daily prayers, fasting, the annual pilgrimage, etc. – are based on the *Sunnah* of the Prophet. The Qur'an commands believers to perform the canonical

⁷ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 265-88: Cf. Hallaq, *A History of Islamic Legal Theories*, p. 7; cf. Duncan B. MacDonald, *Development of Muslim Theology, Jurisprudence and Constitutional Theory*, (Read Books, 2007), pp. 65ff.

⁸ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 275-88; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 40-58.

prayers, to fast, and to perform the pilgrimage, but it was the Prophet who taught them how to perform these acts, along with other religious rituals such as marriage and burial of the dead.⁹

The legal essence of Islam was embedded in the revelation as presented by the Qur'an and in the guidelines of the Prophet. These distinctive features of Islamic Law were inherent in the fresh legal instructions that had been given by God. Even the prophetic individual opinion was based on the revelation of God's *wahy*.¹⁰ During the thirteen years that the Prophet spent in Mecca, the essence of the Qur'an was focused on faith and ethics, with little reference to the practical element of Islamic law. The period covered by the life of the Prophet was the most central period in the history of Islamic law, since only then was there any divine revelation. Islamic law entered a new phase subsequent to the Prophet's flight (*hijrah*) to Yathrib, when a Muslim state was established. This heralded an era in which the practicalities of legislation had to be established.¹¹

The Muslim state required legal answers for all its difficulties, with regard not only to practical issues such as family, crime, *jihād* and inheritance but also matters relevant to ritual and worship.

Islamic law was completed via two methods in this period.

A) A number of Qur'anic verses were direct answers to questions that were asked. For example, intoxicants were forbidden in the Qur'an gradually through several separate verses revealed at different times over a period of years. The circumstances accompanied the revelation of certain verses that we call *asbâb al-nuzûl*. For

⁹ Al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 87-98.

¹⁰ His status as a messenger was based on Revelation, which is of two kinds:

The *First* is explicit Revelation. In this case, the Noble Messenger is merely an interpreter and announcer, with no share in the content. The Qur'an and some Sacred Hadith are included in this kind of Revelation. The *Second* is implicit Revelation. The essence and summary of this is also based on Revelation or inspiration, but its explanation and description were left to the Messenger. When he explained and described such Revelation, he sometimes also relied on Revelation or on inspiration or sometimes spoke on the basis of his own insights. When he resorted to his own interpretation, he either relied on the perceptive power given him on account of his prophetic mission, or he spoke as a human being and in conformity with usage, custom and the level of common comprehension.

Thus, all the details of every *Hadith* are not necessarily derived from pure Revelation, nor should the lofty signs of his status as messengership be sought in such ideas and transactions he had that were required by his participation in the human state. Cf: Said Nursi Bediuzzaman, *Letters*, trans. by Shukran Wahide, (Istanbul: Sozler Publications, 2004), p. 123.

¹¹ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 308-36; Mû'il Yûsuf 'Izz al-Dîn, *Islamic Law: from Historical Foundations to Contemporary Practice* (Edinburgh: Edinburgh University Press, 2004), pp. 3-4.

example, the case of forbidding wine is a good example. *"They ask you about wine and gambling. Say, 'There is great evil in them as well as benefit to man'. But the evil is greater than the benefit."*¹² At a second stage it was forbidden for Muslims to attend prayers while intoxicated (4:43). This was the next step in turning people away from the consumption of alcohol. Finally, "intoxicants and games of chance" were called "abominations of Satan's handiwork," intended to turn people away from God and to have them forget about prayer, and Muslims were ordered to abstain (5:90-91).¹³

Sometimes, verses were revealed because of particular incidents that took place during the life of the prophet. An example can be found in the case of Hilâl ibn Umayyah. *"And for those who accuse their wives, but have no witnesses except themselves, let the testimony of one of them be four testimonies (i.e. testifies four times) by Allâh that he is one of those who speak the truth. And the fifth (testimony) (should be) the invoking of the Curse of Allâh on him if he be of those who tell a lie (against her). But it shall avert the punishment (of stoning to death) from her, if she bears witness four times by Allâh, that he (her husband) is telling a lie. And the fifth (testimony) should be that the Wrath of Allâh be upon her if he (her husband) speaks the truth..."*¹⁴

B) To complete a whole legal system, some injunctions were revealed to the Prophet directly without any question or particular incidents. For example, many rules relating to family law or penal law were revealed directly to complete the divine message.¹⁵

During the Prophet's life and shortly thereafter his sayings were written down on media such as parchment, papyrus and shoulder bones of camels. They were also preserved orally by a people whose lengthy poetic tradition had been transmitted solely by mouth in the period preceding the rise of Islam. In the 8th and 9th centuries, however, scholars began to collect the sayings of the Prophet after devising rigorous criteria for examining the authenticity of the chain of transmission (*isnâd*). The result of this Herculean task was the Sunnî compilation of six collections of sayings known as the *al-Kutub al-Sittah* the most famous of which was compiled by al-Bukhârî. In the 10th century the Shî'ites compiled their own collection in four volumes known as The Four Books (*al-kutub al-arba'ah*), of which the most famous was by al-Kulaynî. But some Shî'ite authorities believe that Shî'ism also has six canonical collections of *Hadîth*. Most of the sayings in the Sunnî and Shî'ite collections are the same, but the chain of transmission differs. Sunnî Muslims believe that many of the sayings were

¹² Qur'an, *al-Baqarah*, 2: 219.

¹³ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 337-41.

¹⁴ Qur'an, *al-Nur*, 6-9; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 47-57; Dien, *Islamic Law*, p. 4.

¹⁵ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 337-41.

transmitted by Ibn al-‘Abbâs and ‘Â’ishah, but Shî’ites accept only members of the household of the Prophet (*ahl al-bayt*) as legitimate transmitters. There are also a number of prophetic sayings known as *al-ahâdîth al-qudsiyyah* (“sacred sayings”) in which God speaks in the first person through Muhammad. In general, these sayings are of an esoteric character and have been of great importance in the development of Sufism.¹⁶

All schools of Islamic law (*Shari’ah*) agree that the *Sunnah* and *Hadîth* of the Prophet serve as the most important source of Islamic Law after the Qur’an. In Islam, even a prophet is not a legislator on his own; rather, God is ultimately the only legislator (*al-Shâri’*). Muslims believe, however, that, as God’s prophet, Muhammad knew the divine will as it was meant to be codified in Islamic Law. His actions and juridical decisions therefore played an indispensable role in the later codification of the *Shari’ah* by various legal schools.¹⁷ Muslims believe that Muhammad brought not only the word of God in the form of the Qur’an to the world but also a divine law specific to Islam, a law whose roots are contained completely in the Qur’an but whose crystallization was not possible without the words and deeds of the Prophet.¹⁸

3.1.2 The Main Features of Legislative Activities

There are three main features to the legislative activity during the time of the Prophet Muhammad.

First, Islamic law promotes simplicity and does not admit difficulty (the principle of *raf’ al-haraj*). More than one verse from the Holy Qur’an and many *Hadîths* support the idea of Islamic simplicity: “*Allah does not wish to place you in difficulty, but to make you clean, and to complete his favor to you, that ye may be grateful*” (al-Mâ’idah 6:6). “*Allah intends every facility for you. He doesn’t want to put you to difficulties*” (al-Qasas 28:27). The Prophet Mohammad said: “*The religion is so easy and anybody enters with difficulty must be overcome*.”¹⁹ God has made provisions for patients, for travelers, for those who have been oppressed, for cases of mistakes or for-

¹⁶ Abdulkarim Zaidan, *al-Madkhal Li Dirâsah al-Shari’ah al-Islâmiyyah* (Baghdad: Matba’ah al-Ânî, 1977), p. 117.

¹⁷ Qur’an 4: 59: “O you who believe! Obey Allâh and obey the Messenger (Muhammad (peace be upon him)) and those of you (Muslims) who are in authority. (And) if you differ in anything amongst yourselves, refer it to Allâh and His Messenger, if you believe in Allâh and in the Last Day. That is better and more suitable for final determination.”

¹⁸ Zaidan, *al-Madkhal Li Dirâsah al-Shari’ah al-Islâmiyyah*, pp. 108-11; Mustafa Ahmed al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid* (Damascus: Dar al-Qalam, 1998), vol. I, pp. 165-72; ibn al-Qayyim al-Jawziyya, *l’lâm al-Muwaqqi’în ‘an Rabb al-‘Âlamîn*, (Beirut: Dar al-Kutub al-Ilmiyyah, 1996), vol. I, p. 9.

¹⁹ Al-Bukhârî, *al-Jâmi’ al-Sahîh*, Kitâb al-Iman.

getting.²⁰ Patients who suffer from chronic conditions such as incontinence must take measures with respect to purity and to allow impurities to exit during prayers in such a way that these impurities would not reach bodies or clothes.²¹

Second, Islamic law attempts to delineate the application of the legal system in relation to the gradual process over time (the principle of *tadrij*). The application of Islamic law cannot be immediate, and that legislation must reflect a step by step development that follows the initial establishment of the creed. The prohibition of alcohol is the best example of that. The main duties of Muslims have been prescribed and prohibitions have been set gradually, as seen in practice of praying, fasting, the payment of *zakâh*, and the gradual prohibition of alcohol.²² Wine was permitted in the Meccan period: “From date-palm and grapes you derive alcoholic drinks, and from them you make good livelihood. Lo! There is indeed a portent for people who have sense” (16:67). In Medina the Qur’an expressed an ambivalent sense of dislike toward alcoholic beverages. “They ask you about wine and gambling. Say: in both there is sin, and utility for people” (2:219). After that, the sense of aversion increases: “O you who believe! Do not come to pray when you are drunk, till you know what you utter” (4:43). Finally, Muslims are ordered categorically to avoid alcohol, games of chance and idols altogether (5:90-91).²³

Third, another main feature of Islamic law in this period is *Naskh*. The *Naskh* is an Arabic word usually translated as “abrogation”; it shares the same root as the words appearing in the phrase *al-nâsikh wal-mansûkh*, “the abrogating and abrogated [verses]”. It is a term used in Islamic legal exegesis for seemingly contradictory material within or between the two bases of Islamic law: the Qur’an and the Prophetic *Sunnah*. Abrogation is applicable to both sources of Islamic law: the Qur’an and the Prophetic *Sunnah*. One Qur’anic verse may abrogate another verse, and one Prophetic *Sunnah* may likewise abrogate another. The possibility of one source, such as the Qur’an abrogating another, such as the *Sunnah*, was a more contentious issue, precipitated by the absence within a source of the appropriate abrogating (*nâsikh*) or abrogated (*mansûkh*) material necessary to harmonize it and the *Fiqh*. The principle of *naskh* is acknowledged by Sunnîs and Shî‘a. The Qur’anic verse 4:43, whose more explicit disapproval of drunkenness is in turn abrogated by the Qur’anic verse 5:90, which institutes a complete ban on the consumption of alcohol. After the period of

²⁰ The Committee, *al-Mawsu‘ah al-Fiqhiyyah al-Kuwaitiyyah*, vol. XIV, p. 211.

²¹ Mu‘awwadh and Abdulmawjûd, *Târikh al-Tashrî‘ al-Islamî*, vol. I, pp. 93-102.

²² Mu‘awwadh and Abdulmawjûd, *Târikh al-Tashrî‘ al-Islamî*, vol. I, pp. 23-6, 102-8; ‘Izz al-Dîn, *Islamic Law*, pp. 133-34.

²³ Abu Ubayd al-Qasim ibn Sallam, *Kitâb al-Nasikh wal-Mansukh* (St. Edmundsbury Press 1987), pp. 87-88.

the Prophet there is no *naskh* in Islamic Law.²⁴

3.1.3 The Prophet's *Ijtihâd* and Interpretation

The lifestyle of the Prophet Muhammad or the way he lived in accordance with God's revelation, the Qur'an, can, in general, be called the *Sunnah*. It might also be said that this *Sunnah* of the Prophet, who was the last of the prophets and the best example for all humanity, is both a practical application of the Qur'an in a particular historical setting and a universal and meta-historical interpretation of it. For his *Sunnah* is rich enough to contain general principles and examples for human beings in all times and places, in spite of historical, geographical, human, cultural, economic and social differences. Therefore, since the early years of Islam to this day, Muslims in every corner of the world have seen the *sîrah* (biography) and *Sunnah* of Prophet Muhammad as a paradigm applicable in all matters that concern them and have tried to comply with his orders and suggestions without objection. He is a good husband, a good president, a good Imâm, and a good commander.²⁵ All the states and acts of the Messenger testified to his veracity and prophethood, but not all of those states and acts had to be miraculous. God Almighty sent him as human being so that he might be a guide and leader to human beings in their social affairs, and in the acts and deeds by means of which they attain happiness in both worlds.

We should not forget that Prophet Muhammad made some decisions based solely on his own judgment (*ijtihâd*), and some of these decisions were soon corrected through the verses of the Qur'an revealed later. The Prophet used his own judgment in a legislative manner and permitted his followers to do so. We cannot say that this factor plays a very important role in this issue of being "historically bound". It is not warranted to argue that Muslims have ignored the human side of Prophet Muhammad, seeing him purely as a messenger with no will of his own, isolated from his human characteristics and acting only on the basis of directives from the Qur'anic revelation. Although some characteristics and aspects of the Messenger have been described in history books and biographies, most of those qualities relate to his humanness. But in reality, the spiritual personality and sacred nature of this blessed being are so exalted and luminous that the qualities described in books fall short of his high stature. He is, indeed, the result and the most perfect fruit of the universe, the interpreter and the beloved of the Creator of the cosmos. Hence his true nature in its enti-

²⁴ Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 110-14; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 111-17; ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. I, p. 29; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 26-7.

²⁵ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 343-59; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 98-110.

rety, and the truth of all his perfections, cannot be contained in the human qualities recorded in books of history and biography.

The fact that Muslim scholars, particularly the scholars in *Usûl al-Fiqh* (Methodology of Islamic Jurisprudence), have extensively discussed the question of the Prophet's *ijtihâd* (making a legal decision through independent interpretation) and, within this framework, classified the decisions he made on the basis of his own judgment and then evaluated these decisions in terms of their binding effect or juridical value. All this clearly shows that Muslim scholars have not seen him as a prophet whose actions are determined entirely and strictly by divine revelation completely isolated from human characteristics. Rather, they have tended to believe that the Prophet Muhammad had some practices that were rooted solely in his human nature and these practices and decisions can be a matter of discussion. Briefly put, we hold that the Prophet Muhammad was a human being who acted in compliance with Allah's revelation.

The human aspect of the Prophet becomes most apparent in the decisions and practices based on his own judgment. The Prophet Muhammad himself often remarked that, in matters not involved in the realm of purely religious convictions and about which there was no divine revelation, he was like any other human being; therefore, he could make some small mistakes (*zallah*) like everyone else among his Companions.²⁶

Muslim scholars have generally agreed that the Prophet might have made some decisions based solely on his own judgment in matters of technical, i.e. administrative, political and economic affairs or in matters belonging entirely to worldly affairs. They disagree more on whether he had authority over purely religious matters such as faith, prayers and rituals. According to the majority view, the Prophet Muhammad did have *ijtihâd* authority in matters about which there was no divine revelation, regardless of the area to which they belonged.

We can classify examples of the Prophet's *ijtihâds* in terms of their essential characteristics as follows:

- Those that pertain to worship and rituals,
- Those that concern judicial matters,
- Those that concern matters of war,
- Those that pertain to worldly affairs.²⁷

²⁶ Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 114-117; Abdulkâdir Ali Hasan, *Nazratun Âmmah fi Târikh al-Fiqh al-Islâmî* (Cairo: Dâr al-Kutub al-Hadîsah, 1965), pp. 1-40; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 98-110.

²⁷ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 343-59.

1. Worship and Rituals. Prophet Muhammad sometimes made decisions based on his *ijtihâd* on matters of prayers and worship. One of the most well-known examples of this is the matter of the *adhân* (call to prayer and one of the most important signs of Islam). The Prophet made a decision that this call should be made to specify the exact times of prayer, thus preventing any damage to people's worldly interests should they attend prayer too early as well as the loss of other-worldly gains because they were late for prayer.

2. Judicial Matters. Prophet Muhammad himself stated that, in matters that pertained to judgments, he had made decisions based on his *ijtihâd*, taking into consideration the defenses of the two parties and the evidence presented to him for and against a given case. A *hadîth* on this point particularly emphasizes his human side: "*I am only a human being. When a case is presented to me, I might rule in favor of the party who presents his case in a better way, wrongly leading me to think that he is right. In this case, if I gave someone something that in fact belongs to his brother rather than himself, he should not accept it. For the thing that I gave him is nothing but a piece of fire.*"²⁸ Emphasizing the human side of the Prophet, this *hadîth* clearly indicates that the Prophet Muhammad was no different from any other human being in resolving problems judicially. This is because the Prophet could not access the knowledge in the realm of the unknown (*ghâib*) unless Allah wanted him to; therefore he had to make decisions based on the apparent and circumstantial evidence presented to him.

3. Matters of War. There are many examples of how the Prophet Muhammad made a decision on the basis of his *ijtihâd* after consulting with his Companions and taking existing conditions into account on matters and strategies of war. An example of such an *ijtihâd* is the fact that the Prophet accepted the offer of the Companion Sa'd ibn Mu'adh to command the army at the Battle of Badr.

4. Worldly Affairs. It is also a historical fact that from time to time the Prophet Muhammad declared his own opinions based on his own experience and judgment on some worldly affairs, and that he even made a mistake in some of his *ijtihâds*. The best example of this is the inoculation of date palms in Medina. According to a report, when the Prophet went to Medina he saw that to have a better harvest the residents fertilized the date palms by conjoining male and female pollens. He then said that, in his opinion, this would not work; upon hearing this, the residents of Medina gave up the practice. However, that year the produce turned out to be less than in earlier years. Then the Prophet said that although they should follow him strictly when he made a decision on matters of faith and religion, he was like any one of them when it

²⁸ Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 98-110; al-Bukhari, "*Mazâlim*" 16, "*Ahkâm*" 29, 31; Muslim, "*Aqdiyah*" 5, 6.

came to worldly affairs, making decisions based on his own judgment, and added, "You know your worldly affairs better than I do, and I know your religious matters better than you do."²⁹

In conclusion, the Prophet Muhammad was a prophet who acted first and foremost under the guidance of divine revelation. Despite this, it is also true that there are some verses in the Qur'an that emphasize his human features as well as those that indicate that he might make mistakes on some issues. In addition, he made decisions based on his own judgment and was wrong (or was at least unable to choose the better option) in some of these decisions. As such, it is clear that not all of his sayings and practices were a product of divine revelation. Muslim scholars and jurists have discussed this matter extensively, particularly in books on the methodology of Islamic jurisprudence. The majority of the *'ulamâ* (religious scholars) have argued with sound evidence that the Prophet Muhammad, like any other Muslim scholar, had the authority of *ijtihâd* and occasionally used it within the limits of his human capacity.³⁰

Moreover, as a prophet who was compelled by divine revelation, the Prophet was mostly right in his *ijtihâd*-based decisions. Although they were few, in those cases where he was mistaken he was often warned by divine revelation and quickly corrected by Allah the Almighty. On the other hand, it is not possible to argue that all the mistakes the Prophet made regarding the purely worldly affairs were corrected by divine revelation or that such corrections were even necessary. In other words, Allah might not have corrected those decisions relating to purely worldly affairs that were based on expertise and experience like medicine, agriculture and technology. However, this does not affect his status as the Messenger of Allah.³¹

There are degrees in the *Sunnah* of the Prophet: some are compulsory (*fardh*); these may not be given up. This sort is described in detail in the *Sharî'ah*. They are incontestable and can in no way be changed. Another sort is voluntary (*nâfilah*), and these are of two sorts:

One sort is those Practices of the Prophet that concern worship (*sunan al-hudâ*). They too are described in the books of the *Sharî'ah*, and to change them is innovation (*bid'ah*). The other sorts are called "conduct" (*âdâb*), and are mentioned in the books of the Prophet's biography. Opposition to them cannot be called innovation, but it is opposition of a sort to the Prophet's conduct and means not benefiting from their light and true courtesy. This sort is to follow the Noble Prophet's actions in customary, natural acts and dealings, which are known through unanimous reports. For example, there are numerous practices showing the conduct of speaking, and explaining the principles of the conduct of eating, drinking, and sleeping, and concerning social intercourse.

²⁹ Muslim, "*Fadhâil*" 139-41.

³⁰ Mu'awwadh and Abdumawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 343-58.

³¹ Cf. Hallaq, *A History of Islamic Legal Theories*, p. 10-15.

Practices of this sort are called “conduct.” One who follows this conduct transforms his habitual actions into worship and receives significant effulgence from the conduct. Practising the smallest aspect of such conduct recalls the Prophet, and imparts a light to the heart.

The most important among the practices of the Prophet are those which are the symbols of Islam and connected with the marks of Islam (*sha‘â’ir*). The marks of Islam are worship, concern the community, and quite simply are general rights of a sort. As the whole community benefits from one person doing them, so on the person giving them up, the whole community is responsible. There can be no hypocrisy in the performance of marks of this sort, and they should be proclaimed. Even if they are of the voluntary sort, they are still more important than personal obligatory acts.³²

The Prophet encouraged and praised his companions about *Ijtihâd*. The best example of this is the case of Mu‘adh ibn Jabal. When Muhammad appointed him a ruler of Yemen he put the following question to Muadh: “According to what will you judge?” “According to the Book of God,” replied Muadh. “And if you find nothing therein?” “According to the Sunnah of the Prophet of God.” “And if you find nothing therein?” “Then I will exert myself (exercise *Ijtihâd*) to form my own judgment.” The Prophet was pleased with this reply and said: “Praise be to God Who has guided the messenger of the Prophet to that which pleases the Prophet.”³³ But we should add that all interpretations by the Companions had the chance to be corrected by revelation during the time of the Prophet.³⁴

The Prophet Muhammad was the best follower of Islamic rules in his life.

3.2 The Period of the Companions (The Period of the Rightly Guided Caliphs=al-Khulafâ al-Râshidûn, 11-40/632-660)

The Companions were the Companions of the Prophet Muhammad. *Sahâbah* is plural; the singular is *Sahâbi* (fem. *Sahâbiyyah*). Most Muslim scholars regard anyone who saw Muhammad while they were in the state of faith as a Companion or *Sahâbi*. Their names and biographies were recorded in religious reference texts such as Muhammad Ibn Sa‘d’s early *Kitâb al-Tabâqât al-Kabîr*. The Prophet left them two main sources of Islamic law: the Qur’an and the *Sunnah*, but they explained and interpreted

³² Said Nursi Bediuzzaman, “The Eleventh Flash,” *The Flashes* (Istanbul: Sozler Publications, 2004), pp. 85.

³³ Abu Dawud, *Sunan*, III, 1013, *Hadîth* no. 3567.

³⁴ Zaidan, *al-Madkhal Li Dirâsah al-Sharî‘ah al-Islâmiyyah*, pp. 115-16; Ali Hasan, *Nazratun Âmmah fi Târikh al-Fiqh al-Islâmî*, pp. 1-40; Muhammad Beg al-Khudari, *Târikh al-Tashrî‘ al-Islamî* (Cairo: 1939), pp. 9-10; Saaduddin A. Alauya, *Fundamentals of Islamic Jurisprudence: With Appendix, Islamic Penal Law* (Manila: Rex Bookstore, Inc., 1999), pp. 196-97; ‘Izz al-Dîn, *Islamic Law*, pp. 4-5.

these two sources. For this reason this period was called *The Age of Legal Interpretation*, the *Period of the Companions*, and the *Period of the Righteously Guided Caliphs=al-Khulafâ al-Rashidûn*.³⁵

We should add that since the great interpreters of the law among the righteous early generations of Islam lived close to the time of the Companions of the Prophet, the *age of light* and *age of truth*, they were able to receive pure light and make pure interpretations. But the interpreters of the law at present look at the book of reality through so many veils and from such a far distance that even its clearest letters they can see only with difficulty.

Following the death of the Prophet, his Companions could only fall back on their own sources. They had to evaluate and deal with social, political and economic dilemmas. But the sources of law were determined, and they made use of these sources.

3.2.1 *The Sources of Legislative Activities*

During the time of the *Sahâbah*, they used four sources of Islamic law.

1. **The Qur'an.** Abu Bakr was instrumental in preserving the Qur'an in written form. It is said that after the hard-won victory over Musailamah at the Battle of Yamama fought in 632, 'Umar (later Caliph 'Umar) saw that many of the Muslims who had memorized the Qur'an had died in battle. Fearing that the Qur'an would be lost or corrupted, 'Umar requested Caliph Abu Bakr to authorize the compilation and preservation of the Book in written format. After some initial hesitation, Abu Bakr appointed a committee headed by Zaid ibn Thâbit, which included those who memorized the Qur'an and 'Umar, to collect all verses of the Book. After collecting all Qur'anic verses from texts in the possession of various *sahâbah*, Zaid ibn Thâbit and members of his committee verified the reading by comparing it with those who had memorized the Qur'an. After they were satisfied that they had not left out any verse or made any mistakes in reading or writing it down, the text was written down as one single manuscript and presented in book form to Caliph Abu Bakr. This process happened within one year after Muhammad's death, when most of his *Sahâbah* (Companions) were still alive, ensuring that the text would not be corrupted in any form.³⁶

³⁵ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 365-92; Ahmed Akgunduz, *Türk Hukuk Tarihi*, vol. I (Istanbul: OSAV, 1995), pp. 118; al-Zarqa, *al-Fiqh al-Islâmî Fi Sawbih al-Jadid*, vol. I, pp. 173-78; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 121-26; ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. I, pp. 9-12; The Committee, *Mawsû'ah al-Adyân al-Muyassarah* (Beirut: Dar al-Nafâ'is, 2002), p. 327.

³⁶ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 428-40; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 127-30.

It was in this period that the knowledge of *asbâb al-nuzûl* emerged. As an Arabic term meaning "occasions/circumstances of revelation," this is a secondary genre of Qur'anic exegesis (*tafsîr*) directed at establishing the context in which specific verses of the Qur'an were revealed and the reasons for the revelations. This term refers to a field of study and genre of literature devoted to recounting the circumstances of the Prophet Muhammad and his followers when particular verses from the Qur'an were revealed. Perhaps the most well-known of these texts is the *Asbâb al-Nuzûl* by 'Ali ibn Ahmad al-Wâhidi, which is regularly reprinted alongside the text of the Qur'an. Legal scholars regard this study as of great importance, on the principle that sound understanding of the revelation proceeds from knowing the reasons God revealed the Qur'an and how the Prophet Muhammad applied the revelation when he received it. For example, lexically, *qurû'* can mean "time of purity," but it can also mean the menses itself. The correct meaning in the verse can be defined only by the reason for the revelation.³⁷

2. **The *Sunnah*.** The Companions of the Prophet had different talents and abilities, but they did agree that the *Sunnah* is the main source of Islamic Law. This does not mean that they agreed on all the deeds and sayings as *Sunnah*, for some of them might not have heard what others had.³⁸

We could say that the following are just some examples and not everything that was recorded at that time: 1) the books of the Prophet that were written to the kings and rulers of his time, such as His book to Heraclius, Emperor of Byzantine; 2) the Treaties, Covenants, and Agreements, such as the treaty with the tribe of Ghatfân during the battle of Khandaq (the trench) in the year 8 H; 3) the Agreements, the Decisions of Pardoning, and Giving Land, such as the contract of giving Tamim Ad-Dari some land in Palestine; 4) the writing of speeches and varying *Ahâdîth*, such as the writing of the *Khutbah al-Wadâ'* by Abu Shâh, narrated in the *Sahîhain* (Bukhârî and Muslim); 5) what the *Sahâbah* (Companions of the Prophet) wrote during the time of the Prophet, such as the genuine journal of 'Abdullah ibn 'Amr ibn al-'Âs, which contained one-thousand *Hadîths*.³⁹

3. ***Ijmâ'*.** The *Ijmâ' al-Sahâbah* is a legitimate source like the Qur'an and the *Sunnah* of the Messenger of Allah. With regard to the *Ijmâ' al-Sahâbah*, they all agreed on the necessity to establish a successor or *Khalîfah* to the Prophet after his death, and they all agreed to appoint a successor to Abu Bakr, then to 'Umar, then to 'Uthman, after the death of each. Some Muslim scholars argued that *ijmâ'* was possible only

³⁷ The Qur'an, *al-Baqarah*, 2:228; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 421-22.

³⁸ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 440-49.

³⁹ Ibn al-Qayyim al-Jawziyya, *I'lam al-Muwaqqi'in 'an Rabb al-'Âlamîn*, vol. I, pp. 9-12.

during the time of the Companions because of the number of Companions. We should mention that the majority of legal injunctions were formed as consultative legislation; this was so particularly with regard to cases those were relevant to public matters during the time of Abu Bakr (632-34) and 'Umar (634-44). For example, when Iraq (*sawâd al-Iraq*) was conquered, 'Umar looked to the Prophet's Companions for advice regarding the distribution and use of its land. He was unsure whether to leave it in the hands of the original owners or distribute it among the conquerors. After consultation, the decision was reached that the land should remain with the owners since they possessed the necessary skills for its future cultivation.⁴⁰

4. *Qiyâs*. We could call *qiyâs* (legal analogy) or *ijtihâd* (exhaustive investigation) or *ra'y* (considered opinion) a source of the law and a means to tie the elaboration of the law more closely to scripture. The Prophet demonstrated *qiyâs* and considered it to be Shar'î evidence. The *Sahâbah* followed him in this regard, and they also considered *qiyâs* as Shar'î evidence for extracting rules. The *Sahâbah* clearly stated that they would use *qiyâs*, and the Prophet approved it. It is documented that the *Sahâbah* used *qiyâs* on many occasions. When Abu Bakr gave the inheritance to the maternal grandmother and not the paternal one, some of the *Ansâr* told him: "You have given the inheritance to a woman (the maternal grandmother) of the dead person (the grandson) who, if she were the deceased person, he would not inherit from her. On the other hand, you excluded a woman (the paternal grandmother) from whom, if she died, this person would inherit. So give them one sixth of the inheritance." When Abu Bakr heard this *qiyâs*, he changed his decision and established the new rule.⁴¹

When the Companions held a council to determine the punishment for drinking wine, 'Ali ibn Abu Tâlib suggested that the penalty of false accusation (*qadhf*) should be applied to the wine drinker, reasoning by analogy, "When a person gets drunk, he raves and when he raves, he accuses falsely."⁴²

We should remember that only *ra'y-i memdûh* (considered opinion) is acceptable according to the Companions. *Ra'y-i Madhmûm* (wrong and refused opinion) is not a source for rules. For this reason Caliph 'Umar reviled the second kind of *ra'y*.⁴³

⁴⁰ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 449-64; 'Izz al-Dîn, *Islamic Law*, pp. 5-6.

⁴¹ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 464-69.

⁴² Zaidan, *al-Wajîz*, p. 177; al-Zarqa, *al-Fiqh al-Islâmî Fi Sawbih al-Jadid*, vol. I, pp. 173-78.

⁴³ Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 118-31; Ibn 'ûl-Qayyim El-Jawziyye, *I'lâm 'ûl-Muvakqî'in*, vol. I (Cairo: 1325-1326), pp. 7-9, 45; Ali Hasan, *Nazratun Âmmah fi Târikh al-Fiqh al-Islâmî*, pp. 54-105; al-Khudari, *Târikh al-Tashrî' al-Islâmî*, pp. 117-20.

3.2.2 *Some Issues Relating to the Period of the Companions*

The Companions cannot be matched with respect to the interpretation of the law, that is, in deducing its ordinances, in understanding what pleases Almighty God from His Word. Because that mighty Divine revolution revolved around understanding God's wishes and Divine ordinances. All minds were turned towards deducing the Divine ordinances. All hearts were eager to know "What does our Sustainer want from us?" All that happened at that time did so in a way that made this known and understood. The discussions of the time concerned them. Thus, since everything and all situations and discussions and conversations and stories occurred in such a way as to give some sort of instruction in these matters, since this perfected the Companions' capacities and illuminated their minds, and since their ability to interpret the law and deduce its ordinances was ready to be lit up like a match, no one at present, even with the intelligence and capacity of the Companions can match in ten years – or perhaps even a hundred – the level of deduction and interpretation they reached in a day or a month. The worldly happiness in our age is the focus of attention, instead of eternal happiness. The attention and gaze of humanity is directed towards different goals.

It was important to identify the Companions because later scholars accepted their testimony (the *hadīth*, or traditions) regarding the words and deeds of Muhammad, the occasions on which the Qur'an was revealed, and various important matters of Islamic history and practice (the *Sunnah*). The testimony of the Companions, since it was passed down through chains of trusted narrators (*isnāds*), was the basis of the developing Islamic tradition.

We could mention some jurists among the Companions: 'Umar, who was famous for his letter to Abu Musa al-Ash'arī on trial law; Zaid ibn Thâbit, who was an expert in heritage law; and 'Abdullah ibn 'Umar who was a master of Abu Hanîfa.

Soon after Muhammad's death, the Muslim community, the *ummah*, was torn by conflicts over leadership. The two largest Muslim groups, the Shī'a and Sunnī, take very different approaches in weighing the value of the Companions' testimony.⁴⁴

According to Sunnī scholars, Muslims of the past should be considered Companions if they had any contact with the Prophet Muhammad and they were not liars or opposed to the Prophet and his teachings. If they saw him, heard him, or were in his presence even briefly, they are Companions. Blind people are considered Companions even if they could not see Muhammad. Even unlearned Muslims are considered Companions. However, anyone who died after rejecting Islam and becoming an apostate is

⁴⁴ Al-Qattân, *Târikh al-Tashrī' al-Islâmī*, pp. 154-75; See Hallaq, *The Origins and Evolution of Islamic Law*, pp. 29-31.

not considered a Companion.⁴⁵

Regard for Companions (*Sahâbah*) is evident from the *hadîths*: it was narrated by ‘Abd-Allah Ibn Mas‘ûd that Muhammad said: “*The best of the people are my generation, then those who come after them, then those who come after them.*”⁴⁶

Sunnî Muslim scholars classified Companions into many categories, based on a number of criteria. Al-Suyûti recognized eleven levels of companionship. However, all Companions are assumed to be just (*‘udûl*) unless they are proven otherwise; that is, Sunnî scholars do not believe that Companions would lie or fabricate *hadîth* unless they were proven to be liars, untrustworthy or opposed to Islam. The *hadîth* quoted above shows the rank of *Sahâbah* (Companions), *Tâbi‘în* (Companions’ companions), and the *Taba‘ al-Tâbi‘în* (*Tâbi‘în*’s companions) among general Muslims.⁴⁷

Shî‘a Muslims do not accept all Companions as just. The Shî‘a believe that after the death of Muhammad, all except three, or some say twelve, Muslims turned aside from true Islam and followed leaders like the first caliphs, Abu Bakr and ‘Umar. Only a few of the early Muslims followed ‘Ali ibn Abu Tâlib, whom Shî‘a Muslims regard as the rightful successor to Muhammad. Shî‘a scholars therefore deprecate *hadîth* that are believed to have been transmitted through unjust companions, and place much more reliance on *hadîth* believed to have been related by Companions who supported ‘Ali.

1. **Abu Bakr** (Abu Bakr as-Siddîq or ‘Abdallah ibn Abû Quhâfah, 573–634/13 AH) was an early convert to Islam and a senior Companion (*Sahâba*) of the Islamic Prophet Muhammad. Throughout his life Abu Bakr remained Muhammad’s friend and confidante. Upon Muhammad’s death, he became the first Muslim ruler (632–634), regarded in Sunnî Islam as the first of the *Rashidûn* (righteously guided Caliphs). Abu Bakr had the distinction of being the first caliph in the history of Islam. He was the first caliph to nominate a successor.⁴⁸

He was the only caliph in the history of Islam who refunded to the state treasury at the time of his death the entire amount of the allowance he had drawn during his caliphate. He was the first Muslim ruler to establish *Bayt al-mâl* and the first Muslim ruler to establish crown pasture. He was also the first Muslim ruler to establish *ijtihâd*. He has the distinction of purchasing land for al-Masjid al-Nabawi. According to Sunnî Muslims, in matters of virtue, Abu Bakr excelled all other *Sahâbah*. The Shî‘a have a

⁴⁵ Abdurrahman ibn Khaldun, *Târîkh ibn Khaldun Kitâb al-Ibar wa Diwân al-Mubtada wal Khabar fi Ayyam al-Arab wal-Ajam wal-Barbar wa man Asarahum min Zawî al-Sultan al-Akbar*, vol. I (Beirut: Dar al-Kutub al-Ilmiyyah, 1992), p. 477.

⁴⁶ Bukhari, Muslim, Abu Dawud, at-Tirmidhi, An-Nasa’i and others.

⁴⁷ ibn al-Qayyim al-Jawziyya, *I‘lâm al-Muwaqqi‘în ‘an Rabb al-‘Âlamîn*, vol. I, p. 12.

⁴⁸ Mu‘awwadh and Abdulmawjûd, *Târîkh al-Tashrî‘ al-Islamî*, vol. I, pp. 501-04.

very unfavorable view of Abu Bakr.⁴⁹

Abu Bakr's method of arriving at legal judgments as follows: Whenever a dispute was referred to him, Abu Bakr used to look in the Qur'an; if he found something according to which he could pass a judgment, he did so. If he could not find a solution in the Qur'an, but remembered some relevant aspect of the Prophet's Sunnah, he would judge according to that. If he could find nothing in the Sunnah, he would go and say to the Muslims: "*Such and such a dispute has been referred to me. Do any of you know anything in the Prophet's Sunnah according to which judgment may be passed?*" If someone was able to answer his question and provide relevant information, Abu Bakr would say: "Praise be to Allah Who has enabled some of us to remember what they have learnt from our Prophet." If he could not find any solution in the Sunnah, then he would gather the leaders and elite of the people and consult with them. If they agreed on a matter then he passed judgment on that basis.⁵⁰

2. **'Umar:**⁵¹ 'Umar's recommendations to the judge, Shurayh, explain his way of deriving judgments from the available evidence. The most noticeable feature of 'Umar's methodology, however, is the fact that he often consulted the *Sahâbah* and discussed matters with them so as to reach the best understanding and find the most appropriate way to carry out judgments. In his approach to questions of legalities, 'Umar was like a shrewd and cautious chemist whose intent is to produce medicine that will cure disease without causing adverse side effects. 'Umar was a great statesman and law expert among the Companions, but 'Uthman was a shrewd businessman and had been a successful trader since his youth, which contributed a great deal to the *Rashidûn* State.⁵²

3. **'Uthman:** When allegiance was given to 'Uthman, it was done on the condition that he work in accordance with the Book of Allah, the Sunnah of His Prophet, and the precedent set by the first two *Khulafâ*. This, he promised to do. 'Ali, however, indicated that when he became *Khalifah* he would be prepared to work according to the Book of Allah and the Sunnah of His Prophet, and then to do the best that his own knowledge and energy would allow. Because 'Uthman showed that he was willing to undertake to work in accordance with the precedents set by the first two *Khulafâ* he was supported by Abd al-Rahman, who had the casting vote. Thus, a third source of legislation, the precedent set by the first two *Khulafâ*; was added at the time of the

⁴⁹ Abdulmun'im al-Hashimi, *al-Khilâfah al-Râshidah* (Beirut: Dar ibn Hazm, 2002), pp. 7-35.

⁵⁰ Shamsaddîn Muhammad Al-Dhahabî, *Siyar A'lâm al-Nubalâ, Siyar al-Khulafâ al-Râshidûn*, (Beirut, Al-Risâlah, 1996), pp. 7-67; Shah Waliyyullah Al-Dahlawi, *Hujjatullah al-Balighah*, (Cairo: Al-Matba'ah al-Khairiyyah, 1322), vol. I, p. 315.

⁵¹ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 471-74.

⁵² Al-Dhahabî, *Siyar A'lâm al-Nubalâ, Siyar al-Khulafâ al-Râshidûn*, pp. 71-137.

third *Khalifah*, and was approved by him. Since 'Ali had reservations about this, when he himself became the *Khalifah* he acted according to his own *ijtihad* in matters for which the earlier *Khulafa* had already produced *ijtihâd*. For example, 'Ali reconsidered the issue of whether slave women who had begotten children for their masters could be sold. 'Uthman ibn Affan was one of the Sahabah who did not produce a great number of *fatâwâ*, probably because most of the matters he came across had already been dealt with by Abu Bakr and 'Umar, and he preferred to adopt their opinions. But in some cases, he had to make *ijtihâd*, just as his predecessors had done.⁵³

Now we will give some comparative information.⁵⁴

A) **Economic Regulations.** 'Umar had fixed the allowance of the people and, on assuming office, 'Uthman increased it by 25%. 'Umar had placed a ban on the sale of lands and the purchase of agricultural lands in conquered territories. 'Uthman withdrew these restrictions because under them trade could not flourish. 'Uthman also permitted people to borrow from the public treasury.

The coins were of Persian origin and bore the image of the last Persian emperor. Muslims added the inscription *Bismillah* to it. In 651 the first Islamic coins were minted during the caliphate of 'Uthman: these were the Persian *dirhams* that bore the image of the Persian emperor Yazdgerd III with the addition of the Arabic inscription *Bismillah* (in the name of Allah). However, the first original minting of the Islamic *dirham* was done in 695 in the Umayyad period.

'Umar, 'Uthman's predecessor, was very strict in the use of money from the public treasury. Apart from the meagre allowance that had been awarded him, 'Umar took no money from the treasury. He did not accept any gifts nor did he allow any of his family members to accept any gift from anyone. During 'Uthman's time, there was some relaxation in this strictness. 'Uthman did not draw any allowance from the treasury for his personal use nor did he receive a salary: he was a wealthy man with sufficient resources of his own. But unlike 'Umar, 'Uthman accepted gifts and allowed his family members to accept gifts from certain quarters.⁵⁵

B) **Public works.** Under 'Uthman the people became more prosperous economically, and invested their money in the construction of buildings. Many new and larger buildings were constructed throughout the empire. During 'Uthman's caliphate, as many as five thousand new mosques were constructed. 'Uthman enlarged, extended and embellished the *al-Masjid al-Nabawi* at Medina and the *Ka'ba* as well. With the expansion of the army, the cantonments were extended and enlarged, more barracks

⁵³ Al-Dhahabî, *Siyar A'lâm al-Nubalâ, Siyar al-Khulafâ al-Râshidûn*, pp. 149-211.

⁵⁴ Ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. I, pp. 16-17; al-Hashimi, *al-Khilâfah al-Râshidah*, pp. 98-115, 261-80.

⁵⁵ Al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 178-80.

were constructed for the soldiers, and stables for the cavalry were extended. 'Uthman provided separate pastures for state camels.

During 'Uthman's caliphate, guest houses were provided in the main cities to provide comfort for merchants from distant places. More and more markets were built and 'Uthman appointed Market Officers to look after them. Numerous canals were dug in Iraq, Egypt and Persia, which stimulated agricultural development. In the cities, particular attention was directed towards the provision of the water supply. In Medina, a number of wells were dug to provide drinking water for the people, and in Mecca the water supply was also improved. Water was brought to Kufa and Basra by canals. Shuaibia was the port for Mecca but it was inconvenient, so 'Uthman selected Jeddah as the site of the new seaport, and a new port was built there. 'Uthman also reformed the police departments in cities.

C) **Administration.** In his will 'Umar instructed his successor not to make any changes in the administrative set-up for one year after his death. For one year 'Uthman maintained the pattern of political administration as it stood under 'Umar, making some amendments later.

Under 'Umar, Egypt had been divided into two provinces, Upper and Lower Egypt. 'Uthman made Egypt one province and created a new province of North Africa. Under 'Umar, Syria had been divided into two provinces but 'Uthman turned it into one. During 'Uthman's caliphate the empire was divided into twelve provinces. These were: Medina, Mecca, Yemen, Kufa, Basra, Jazira, Fars, Azerbaijan, Khorasan, Syria, Egypt and North Africa.

The provinces were further divided into districts (more than 100 districts in the empire) and each district or main city had its own governor, chief judge and *amil* (tax collector). The governors were appointed by 'Uthman and every appointment was made in writing. At the time of appointment, an instrument of instructions was issued with a view to regulating the conduct of the governors. On assuming office, the governor was required to assemble the people in the main mosque and read the instrument of instructions to them. 'Uthman appointed his kinsmen as governors of four provinces: Egypt, Syria, Bosra and Kufa. The kindest explanation for this reliance on his relatives is that the Rāshidūn Period had expanded so far and so fast that it was becoming extremely difficult to govern and that 'Uthman felt that he could trust his own relatives not to revolt against him. However, Shī'a Muslims did not see this as prudent but as nepotism and an attempt to rule like a king rather than as the first among equals.

D) **Concerning the Qur'an.** 'Uthman is best known, perhaps, for forming the committee that compiled the text of the Qur'an as it exists today. The reason was that various Muslim centers, like Kufa and Damascus, had begun to develop their own tra-

ditions for reciting and writing down the Qur'an. This copy of the Qur'an is believed to be one of the oldest, compiled during Caliph 'Uthman's reign. 'Uthman feared that the nascent Rashidûn Caliphate would fall apart as a result of religious controversy if everyone did not have access to a common text of the Qur'an. Towards the end of his reign, the committee, which Zaid ibn Thâbit hadheaded, finished compiling the text, and 'Uthman had it copied and sent to each of the Muslim cities and garrison towns, commanding that alternate versions of the Qur'an be destroyed, and only the official version used. 'Uthman is said to have been reviewing a copy of the Qur'an when he was assassinated.⁵⁶

While Shî'a and Sunnî accept the same sacred text, the Qur'an, some claim that Shî'a dispute the current version, i.e. they add two additional *sûrahs* known as *al-Nûrayn* and *al-Wilâyah*. Nonetheless, Shî'as claim that they are falsely accused of this, since they believe, like Sunnîs, that the Qur'an has never been changed, and it is with reference to Sunnî *hadîth* books that this inference is drawn not only by uninformed Shî'as but Sunnî as well. Zaid ibn Thâbit was put in charge of the operation. The third caliph 'Uthman (644-655), again commissioned Zaid ibn Thâbit, said to have been the Prophet's scribe, to undertake the task of compiling a standard text, which he seems to have accomplished successfully. Several copies of this text were made and later distributed to the garrison towns; all other previous collections have reportedly been destroyed to avoid conflicts in text and recitation.⁵⁷

4. **'Ali ibn Abu Tâlib.** 'Ali was like 'Umar ibn al-Khattab in the way he understood and applied the texts of the Qur'an and in his deep concern with linking particular issues to general principles. Prior to his assuming the office of Khalifah, he was considered the best judge in Madinah. He also advised 'Umar to set *Hijrah* as the beginning of the Islamic calendar. 'Umar used 'Ali's suggestions in political issues as well as religious ones.⁵⁸

'Ali was a member of the electoral council appointed by 'Umar to choose the third caliph. Although 'Ali was one of the two major candidates, the council voted against him. The cousins Sa'd ibn Abu Waqqas and 'Abdur Rahman ibn 'Awf were naturally inclined to support 'Uthman, who was 'Abdur Rahman's brother-in-law. In addition, 'Umar gave the casting vote to 'Abdur Rahman. 'Abdur Rahman offered the caliphate to 'Ali on the condition that he rule in accordance with the Qur'an, the example of the Prophet, and the precedents established by the first two caliphs. 'Ali re-

⁵⁶ Al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 130-33; al-Hashimi, *al-Khilâfah al-Râshidah*, p. 280.

⁵⁷ Al-Zarqa, *al-Fiqh al-Islâmî Fi Sawbih al-Jadid*, vol. I, pp. 173-83; Zaidan, *al-Madkhal Li Dirâsah al-Shari'ah al-Islâmiyyah*, pp. 118-31; Hallaq, *The Origins and Evolution of Islamic Law*, p. 33.

⁵⁸ Al-Hashimi, *al-Khilâfah al-Râshidah*, pp. 333-38; Ibn 'ûl-Qayyim al-Jawziyye, *I'lam' al-Muwakkqi'in*, vol. I, p. 17; Mu'awwadh and Abdumawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 474-79.

jected the third condition while 'Uthman accepted it.⁵⁹

We could summarize that in this period; 1) the use of *al-qiyâs* was widespread in cases where there was no relevant text in the Qur'an or Sunnah and none of the *Sahâbah* objected to this. 2) *Al-Ijmâ'* was also widely used as a basis for judgment. This was facilitated by the fact that the *Sahâbah* were few, and it was easy for them to agree amongst themselves. They used *al-Ijmâ'* in many cases; for example, their decisions that the *Khalifah* or Imam should be appointed, that apostates should be fought and killed, that an apostate could not be taken as a prisoner of war, and that the Qur'an should be collected and written down in one volume.

3.2.3 Some Examples from the Opinions of the Companions

We should draw attention to other aspects of this period.

During this time some textually prescribed injunctions were suspended on the grounds that they lacked the circumstances and spirit of legislation that the Qur'an and *Sunnah* required for their application. Let us mention some examples:

a. The suspension of the share of the people whose hearts need to be reconciled (*mua'allafah al-qulûb*), on the pretext that shares used to be granted to them on the basis that they represented a threat to Muslims. When Islam increased in strength, the reason (*'illah*) for the injunction became invalid and the text was not applicable (although not canceled).

b. The suspension of the punishment for theft, which was again prescribed by the Qur'an. Accordingly, 'Umar did not amputate the hands of some poor people (*qat' al-yad*) who had stolen a female camel while working for Khatib ibn Abu Balta'a. 'Umar's justification for not applying the instruction of the Qur'an was that there was a famine at the time when the act was committed; necessity can thus justify what is prohibited.⁶⁰

It is clear that the *Sahâbah* sometimes arrived at a consensus (*ijmâ'*) in religious rules and were sometimes in conflict. We would like to mention some examples of them having reached a consensus and their conflicts.

⁵⁹ Al-Dhahabî, *Siyar A'lâm al-Nubalâ, Siyar al-Khulafâ al-Râshidûn*, pp. 225-288; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 118-231; Ibn 'ûl-Qayyim al-Jawziyye, *I'lâm 'al-Mu-vakqî'in*, vol. I, pp. 7-9, 45; Ali Hasan, *Nadhratun Âmmah fi Târikh al-Fiqh al-Islâmî*, pp. 54-105; al-Khudari, *Târikh al-Tashrî' al-Islâmî*, pp. 117-20.

⁶⁰ The Qur'an, 9:60, 5:38; Dien, *Islamic Law*, p. 6.

3.2.3.1 Some Examples of Consensus among the *Sahâbah*

1. The Caliphate of Abu Bakr. The *Sahâbah* met after the death of the Prophet at the *saqîfah* (hall) of Bani Sa'ida with "one ruler from us and one ruler from you" (i.e. one from the *Ansâr* and one the *Muhâjirîn*). To this Abu Bakr replied: "It is forbidden for Muslims to have two rulers" Then he got up and addressed the Muslims, saying that Abu Bakr said on the day of al-Saqîfah: "It is forbidden for Muslims to have two rulers for this would cause differences in their affairs and concepts, their unity would be divided and disputes would break out amongst them. The *Sunnah* would then be abandoned, the *bid'ah* (innovation) would spread and *Fitnah* would grow, and that is in no one's interest."

Therefore Abu Bakr delivered the *Sharî'ah* verdict on the unity of the Khalîfah, stressing that it is forbidden for the Muslim *Ummah* to have more than one ruler. The *Sahâbah* heard him and approved and consented; no one disputed the verdict and all submitted to it and accepted it as a law (indication of evidence from the *Sunnah*). The *Ansâr* then conceded their claim to the Khalîfah, and al-Habbab Ibnu al-Mundhir was the first to pledge allegiance to Abu Bakr. The general consensus of the *Sahâbah* then took effect on the day of al-Saqîfah, which is an obligation for all Muslims to have one ruler only.⁶¹

2. Refrain from Paying *Zakâh*. The Companions discussed the case of one who refrains from paying *Zakâh* without denying the obligation to do so. Such an individual would be guilty of committing a sin. Yet this act does not place him outside of Islam. It is the ruler's duty to take *Zakâh* from the defaulter by force and rebuke him, provided he does not collect more than the stipulated amount.

If some people refrain from paying *Zakâh* while knowing they should and that they can afford to pay, they should be fought until they yield and pay. Al-Bukhârî and Muslim report that Ibn 'Umar heard the Prophet say: "*I have been ordered to fight people until they say that none has the right to be worshipped but Allah, and that Muhammad is His Messenger, and they uphold the prayers, and pay the Zakâh. If they do this, their lives and properties will be safe, except for what is due to Islam, and their accounts are with Allah.*"⁶²

Abu Hurairah is reported to have said: "When Allah's Messenger died and Abu Bakr succeeded him as caliph, some Arabs apostatized, causing Abu Bakr to declare war upon them. 'Umar said to him: 'Why must you fight these men?' especially when there is a ruling by the Prophet: *I have been called to fight men until they say that none has the right to be worshipped but Allah, and whoever said it has saved his life*

⁶¹ Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 133-35; ibn al-Athîr, *al-Kâmil fî al-Târîkh*, vol. II (Beirut: Dâr Sâdir, n.d.), pp. 325-32.

⁶² Al-Bukhârî and Muslim; cf. the Qur'an, 2: 193.

and property from me except when a right is due in them, and his account will be with Allah. Abu Bakr replied: 'By Allah! I will fight those who distinguish between *salah* and *Zakâh* because *Zakâh* is what is due on property. By Allah! If they withhold even a young she-goat (*'anaq*) that they used to pay at the time of Allah's Messenger, peace be upon him, I would fight them.' Then 'Umar said: 'By Allah! It was He who gave Abu Bakr the true knowledge to fight, and later I came to know that he was right.'"⁶³

To these problems we should add the question of the compilation of Qur'an, arranging *diwâns* by 'Umar, and the funeral of the Prophet Muhammad.⁶⁴

3.2.3.2 Some Examples from the Conflicts among the Companions

There are some religious issues about which the Companions were in conflict regarding their solution. We would like to mention some questions as examples.

1. **Land as War Booty** "*And know that whatever of war-booty that you may gain, verily one-fifth (/5th) of it is assigned to Allâh, and to the Messenger, and to the near relatives (of the Messenger and also) the orphans, al-Masâkîn (the poor) and the wayfarer, if you have believed in Allâh and in that which We sent down to Our servant (Muhammad (peace be upon him)) on the Day of criterion (between right and wrong), the Day when the two forces met (the battle of Badr); And Allâh is Able to do all things.*"⁶⁵

It was set down as a policy under 'Umar that the land in conquered territories were not to be distributed among the combatants but was to remain the property of the previous owners. The army felt dissatisfied about this decision, but 'Umar suppressed the opposition with a strong hand. 'Uthman followed the policy devised by 'Umar and there were more conquests, and land revenues increased considerably. The army once again raised the demand for the distribution of the land in conquered territories among the fighting soldiers, but 'Uthman turned down the demand and favored the *dhimmi*s (non-Muslims in an Islamic state). He argued on the basis of the verse from the Qur'an: "*What Allâh gave as booty (Fai') to His Messenger (Muhammad) from the people of the townships - it is for Allâh, His Messenger (Muhammad), the kindred (of Messenger Muhammad), the orphans, al-Masâkîn (the poor), and the wayfarer, in order that it may not become a fortune used by the rich among you. And whatsoever the Messenger (Muhammad) gives you, take it; and whatsoever he forbids you, abstain (from it). And fear Allâh; verily, Allâh is Severe in punishment.*"⁶⁶

⁶³ Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, p. 135; al-Athir, *al-Kâmil fi al-Târîkh*, vol. II, pp. 342-49.

⁶⁴ Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 135-37.

⁶⁵ The Qur'an, *al-Anfal*, 8: 41.

⁶⁶ The Qur'an, 59:7; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 138-42.

2. The Punishment for Drinking Alcohol (*Hadd al-Shirb*). There were no differences of opinion among the *Sahâbah* over punishing those who consumed alcohol, but there was some difference of opinion as to the number of lashes. The majority of Companions held that it was eighty lashes for a free people and forty for others.

There is a *hadîth* that says that a man who had drunk wine was brought to the Prophet and he had him flogged forty times with two palm branches that had been stripped of their leaves. Abu Bakr also did likewise (during his caliphate). When 'Umar was caliph, he consulted the people and 'Abd al-Rahman said, "The minimum punishment is eighty," so that is what 'Umar commanded.

Most of the *Sahâbah* agreed with 'Umar. The Council of Senior Scholars agreed that the punishment for one who drinks wine is the *hadd* punishment, which is eighty lashes.⁶⁷

3. Three Divorces (*Talâq Thalâthah*). During the time of the Prophet Muhammad and that of Abu Bakr the pronouncement of divorce three times in one sitting counted as only one divorce. Thus, if a man pronounced divorce three times in one sitting, his wife was not forbidden to him forever. They could be united again without any condition. But 'Umar started to enforce triple divorce because of its misuse by some people.⁶⁸

3.3 The Period of the *Tâbi'în* (Followers=Successors of the Companions, 41-120/660-738)

The *Tâbi'în* (followers) are the generation of Muslims who were born after the death of Muhammad but were the contemporaries of the *Sahâbah*. As such, they played an important part in the development of Islamic thought and philosophy and in the political development of the early caliphate. In particular, they played a vital role in the split in the Islamic community between Sunnî and Shî'a Muslims. To this day, interpretations of their behavior and characters are highly controversial. We can define a *Tâbi'î* as a Muslim who a) saw at least one of the Companions of Muhammad, b) was rightly guided (according to the Sunnî, one who adhered to the beliefs and actions of the *Ahl al-Sunnah wal-Jamâ'ah*), c) one who died in that state. A good example here would be the *Khawârij*. They saw many of Muhammad's Companions but were not called *Tâbi'în* because they were not rightly guided (a view held by both Shî'as and Sunnîs). Imâm Abu Hanîfa is included among the *Tâbi'în*. *Taba'al-Tâbi'în* is the generation after the *Tâbi'în* in Islam. Imâm Mâlik, Imâm Shâfi'î and Imâm Ja'far

⁶⁷ Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 143-44.

⁶⁸ Mu'awwadh and Abdulmawjûd, *Târîkh al-Tashrî' al-Islâmî*, vol. I, pp. 524-6; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 145-46.

al-Sâdiq are among the *Taba' al-Tâbi'in*. This period starts with the Umayyad Caliphate. It was ruled by the Umayyad dynasty, whose name derives from Umayya ibn Abd Shams, the great-grandfather of the first Umayyad caliph. Damascus was the capital of the Umayyad Caliphate, but after the Umayyads were overthrown by the Abbasid Caliphate, they relocated to al-Andalus, where they established the Caliphate of Cordoba. Caliph Mu'âwiya (661-80) was the first ruler of the Umayyad dynasty.⁶⁹

In this period (660-738), several developments came together to produce a distinctly new phase in the history of Islamic Law.

3.3.1 The Features of Legislative Activities

There are many factors that affected legislative activities during the time of the *tâbi'in*.

1) Islamic conquests and victories extended Islamic influence in Asia, Africa and some parts of Europe and in this way diverse cultural tradition entered the vast domain of Islam. When Mu'âwiya ibn Abu Sufian became caliph (662), Islamic law witnessed a fundamental change in its establishment when the governmental system was forcibly changed from selection on the basis of merit to hereditary succession (*saltanah*). On account of this, new requirements and needs were felt, and *fiqh* was bound to answer all of them in addition to presenting appropriate *ahkâm* that could suit different environmental and social conditions. In the same period the Shî'a, who formed a section of Islamic society, also encountered the new problems that faced society. They also considered it essential to find solutions to the new problems. But due to their particular point of view, they never came across the above-mentioned strains when facing diverse situations. This was because when Imâm 'Ali was present, they went to him to solve their problems. The political conflicts made way for legal ones.⁷⁰

By that time Islam existed not only in Mecca and Medina but had reached as far as Egypt and Syria. Islamic legal theory was no longer purely that of the Prophet, and the law was influenced by the theology that had developed, which reflected the political differences.

2) At this time the transfer of *hadîth* increased due to needs arising from more

⁶⁹ Ibn 'ûl-Qayyim al-Jawziyye, *I'lâm 'al-Muvakqî'in*, vol. I, pp. 18-19; al-Zarqa, *al-Fiqh al-Islâmî Fi Sawbih al-Jadid*, vol. I, pp. 185-87; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, p. 132; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 193-98; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 3-4.

⁷⁰ Ibn 'ûl-Qayyim al-Jawziyye, *I'lâm 'al-Muvakqî'in*, vol. I, pp. 7-9, 45; Ali Hasan, *Nazratun Âmmah fi Târikh al-Fiqh al-Islâmî*, pp. 7-9, 45-50; al-Khudari, *Târikh al-Tashrî' al-Islâmî*, pp. 117-20; 'Izz al-Dîn Dien, *Islamic Law*, p. 6-7.

conflicts among Muslims legally and politically. Muslims were in urgent need of *hadîths* to solve their problems. For this reason, they asked the Companions to tell them more traditions. Even though there were around 114,000 Companions when the Prophet passed away, only 1000 or 1500 of them transmitted *hadîths*. The companions who transmitted *hadîths* were put in two categories in terms of the number of their narrations: those narrated few *hadîths* are called *Muqillûn* while those who narrated many *hadîths* are called *mukthirûn*, such as Abu Hurayra, ‘Abdullah ibn ‘Umar, Anas ibn Mâlik and ‘Aisha..⁷¹

There are reasons for the fact that these Companions’ transmitted more *hadîths* than others. All these distinguished Companions were devoted to learning and got to know the Prophet in their youth when their memories were sharp. And they lived for a long time after the Prophet’s passing. While some of the Companions were busy with worldly occupations, the *Mukthirûn* were with the Prophet most of the time because some of them were young and single and some were from *Ashâb al-Suffa*. Therefore, they were able to learn more *hadîths* from the Prophet. Additionally, their special interest in learning *hadîths* can be cited among the reasons for their transmission of many of them.

3) *Tadwîn al-Hadîth* (Recording and Codifying *Hadîths*) became an urgent need for Muslims in this period. Because the need for *hadîths* increased, the manufacturing of *hadîths* arose due to Sunnî and Shi‘î conflicts, and the number of Companions started to decrease. The Companions played an important role in learning and teaching the *hadîths* of the Prophet. They used all three methods applied by the Prophet to teach the *Sunnah*, and committed *hadîths* of the Prophet to memory.

We find that many Companions recorded *hadîths*. For example, ‘Abdullah ibn ‘Amr was permitted and even encouraged writing down *hadîths*. In addition, some fifty Companions and many followers are said to have possessed manuscripts (*sahifah*, Arabic plural of *suhuf*, which was used as a term to designate compendia of *hadîths* that emerged during the century before the formation of the classical collections).

The original manuscripts have been lost, but some, very few, copies survived. An example is the manuscript of Hammâm ibn Munabbih, who learned from Abu Hurairah and wrote his manuscript containing 138 *hadîths*. This manuscript is believed to have been written down about the middle of the first century after the *Hijrah* (seventh century).

4) Among the significant features of this period was the emergence of differences of opinion between legal scholars on a variety of matters. This was underscored by

⁷¹ Ibn ‘ûl-Qayyim al-Jawziyye, *I‘lâm ‘al-Muvakqî‘în*, vol. I, pp. 10-11.

two decisions taken by the *Khalifah* of the times, 'Umar ibn 'Abd al-'Aziz. He ordered that practices attributed to the Prophet should be collected and written down. Accordingly, the people of every locality wrote down in books whatever they knew to be a part of the *Sunnah*. He restricted the authority to issue *fatâwâ*, in most districts, to a few named individuals, as he did in Egypt, when he named only three people for this purpose. Interestingly, two of them were freedmen, Yazid ibn Abu Habib and 'Abd Allah ibn Abu J'afar, and the third was an Arab, Ja'far ibn Rabi'ah. When the *Khalifah* was questioned about appointing two freedmen and only one Arab, he answered: "What fault is it of mine if the freedmen are improving themselves and you are not?" In his letter to Abu Bakr Muhammad ibn 'Amr ibn Hazm al-Ansari, the *Khalifah* explained his reasons for ordering that the practices attributed to the Prophet should be written down. He wrote: "Look for whatever Hadith of the Prophet, or *Sunnah*, or practice you can find. Then write these down for me; for I fear that this knowledge will pass away with the passing of the scholars."⁷²

At the beginning of the second Hijrî century, during the caliphate of 'Umar ibn 'Abdul-'Azîz (97-101/715-19) the texts of *hadîths* were committed to writing. During this period, great value was ascribed to the *Sunnah* and to all that is based on it. The *Sunnah* was collected in Syria, Egypt, Iraq, Yemen and Khurasan. Leading theologians uttered some warnings against unscrupulous reporters and their unreliable reports. 'Umar is reported to have rebuked one of his administrators when he came to power for not following the *Sunnah* of the Prophet and for not abandoning "the innovations that took place after the *Sunnah*." He is also reported to have asked Abu Bakr al-Ansari and others to "look for what there is of the *hadîth* of the Prophet and of his *Sunnah*." The task of coordinating the material he received from his subordinates was assigned to Imâm Zuhri.⁷³

In this regard it is very important to note that there are two kinds of compilations: *musnad* and *musannaf*. In *musnad* collections, *hadîths* are arranged alphabetically under the names of the Companions on whose authority these *hadîths* were reported. Through all these improvements the sources of Islamic law did not change in this period. *Musannaf* *hadîth* collections are defined by their arrangement of content according to topic and constitute a major category within the class of all such works. There were four sources in this period: the Qur'an, the *Sunnah*, *Ijmâ'* and *Qiyâs*.⁷⁴

⁷² Yusuf ibn Abdallah ibn Muhammed Ibn Abd al-Barr, *Jâmi' Bayân al-'Ilm wa Fadhihi*, (Dammam: Dar Ibn al-Jawzi, 1998), vol. I, pp. 33; this letter was narrated by al-Imam al-Bukhari in his *Sahih* without a formal chain of narrators (ie. *Ta'liqan*; as a *Mu'allaq* Hadith).

⁷³ See Hallaq, *A History of Islamic Legal Theories*, pp. 14-15.

⁷⁴ Zaidan, *al-Madkhal Li Dirâsah al-Shar'ah al-Islâmiyyah*, pp. 132-40; Ali Hasan, *Nazratun Âmmah fi Târîkh al-Fiqh al-Islâmî*, pp. 106-220.

3.3.2 *The Hijaz School of Fiqh and the Baghdad (Kufic) School of Fiqh*

The diversity of Islamic law effected not only a “clustering” of the law but also a geographical evolution that had been generated by contrasting individual situations as they emerged in various parts of the Muslim world. One can clearly observe a relationship not only between geographical location and the format of law but also between the personalities of the scholars and their individual attitudes towards the law.

During this period, the eminent legal specialists conducted their activities in the major cities of the new state, namely, Medina, Mecca, Kufa, Basra, Damascus, Fustat and Yemen. The Hijaz and Iraq were the lion’s share of this pool of talent. The tide of events in the second century of Hijra gave birth to scholars who systematized the science of *Fiqh*. Medina and Kufa were two of the prime centers of learning in the early years of Islam. Medina was the city of the Prophet and the people of Medina had ready access to Prophetic traditions. However, as the heart of the Islamic State, Medina was insulated from the challenge of ideas from neighboring civilizations. Kufa, on the other hand, located at the confluence of Arabia and Persia, was a melting pot and more susceptible to foreign ideas. It was only natural that Medina and Kufa would become the earliest centers of schools of jurisprudence. Thus, the earliest developments in *fiqh*, centered in Medina and Kufa, were exposed to somewhat different geographical and historical challenges. These two schools were referred to as the Madinite School and the Kufic School.⁷⁵

A) The Hijaz School of Fiqh. Medina was the center where all branches of Islamic learning were taught by great scholars and dedicated people who had studied the sciences of the Qur’an, the *Sunnah*, and the principles of jurisprudence from the Prophet and his Companions. The masters of this school from the Companions were ‘Umar, Zaid b. Thâbit, ‘Abdullah ibn ‘Umar, ‘Aisha and ‘Abdullah ibn Abbas and from the *tâbi‘în* the *fuqahâ al-sab‘ah*, seven famous jurists, i.e. Sa‘îd ibn al-Musayyab, ‘Urve ibn Zubair, Khârijah ibn Zaid, Abu Bakr ibn Abdurrahman, Sulayman ibn Yasâr, Qâsim ibn Muhammad and ‘Ubeydullah ibn ‘Abdullah.⁷⁶ These seven Followers constituted a consultative body to which all Islamic law problems were referred. It is essential to mention here that the practice of *ra’y* was not accepted by the Sunnî community without any resistance, and the different Sunnî schools were not uniform in this regard. They used *hadîth* more than *ijtihâd* and *ra’y*. Mâlik’s model legal system

⁷⁵ Al-Qattân, *Târîkh al-Tashrî‘ al-Islâmî*, pp. 210-12; ‘Izz al-Dîn, *Islamic Law*, pp. 10-11; cf. Christopher Melchert, *The Formation of the Sunnî Schools of Law, 9th-10th Centuries*, (Leiden: E.J. Brill, 1997), pp. 1ff.

⁷⁶ Al-Qattân, *Târîkh al-Tashrî‘ al-Islâmî*, p. 229.

was that of the city of the *Hijrah*, al-Medina, with all the real imprint and symbolic lore it bore of the Prophet's practices and those of his illustrious Companions and the four Caliphs. The Hijaz School of Fiqh, whose founders included Mâlik ibn Anas al-'Asbahî (93-179/711-795), was a section of the Sunnî community that was too curious every kind of *Ijtihâd*. Others who shared this outlook were the Hanbalîs, the followers of Ahmad ibn Hanbal al-Shaybani (164-241/780-855), and the Zâhirîs, the followers of Dawud ibn 'Ali al-'Isfahani, known as Abu Sulayman Zâhirî (200 or 202-270/815 or 817-883). In the beginning, however, Mâlik did not subscribe to this outlook and approved of the practice of *ra'y*.⁷⁷

The followers of this school drew attention to '*amal ahl al-Medina*. That means everybody should follow the people of Medina: it was where the *Hijrah* went, the Qur'an was proclaimed in Medina, permitting what is permitted and prohibiting what is prohibited. The Prophet, in their midst, the people of Medina witnesses the revelation ... the Prophet rules and they obey him; he legislates for them (*yasunn lahum*) and they abide....⁷⁸

B) The Baghdad (Kufic) School of Fiqh. Kufa was the regional capital from which the Umayyads ruled 'Iraq al-'Arab (modern Iraq), 'Iraq al-'Ajam (western Persia), Pars (central and southern Persia), Khorasan (in Azerbaijan) and western India (Pakistan). The Kufans had somewhat less access to the traditions of the Prophet, but they were at the front of the challenge of ideas from the neighboring Greek, Persian, Indian and Chinese civilizations. Their masters from the Sahâbah were 'Ali ibn Abu Tâlib, 'Umar and 'Abdullah Ibn Mas'ûd and from the Tâbi'în were 'Alqamah, Aswad, Qâdhî Shûrâyh and Ibrahim al-Nakha'î who was master of Abu Hanîfa. They had to be curious about narrators and narrations, but when they could not find any true hadîth, they would appeal to *ra'y* and *Ijtihâd*. The foremost scholar of the Kufic School was Imâm Abu Hanîfa.⁷⁹

We could summarize that the school of law based on the opinions of 'Umar, 'Uthman, Ibn 'Umar, 'A'ishah, Ibn 'Abbas and Zayd ibn Thabit, and their companions from among the Tabi'în, like Sa'id ibn al-Musayyab (93 AH), 'Urwah ibn Zubayr (94), Salim (106), Ata' ibn Yasar (103), Qasim ibn Muhammad (103), 'Ubayd Allah ibn 'Abd Allah (99), al-Zuhri (124), Yahya ibn Sa'd (143), Zayd ibn Aslam (136) and Rabi'ah al-Ra'i (d 136), was the school most acceptable to the people of Madinah. It was for this

⁷⁷ Ibn 'ûl-Qayyim al-Jawziyye, *I'lâm 'al-Muwakqî'in*, vol. I, p. 19; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 212-13; see Hallaq, *The Origins and Evolution of Islamic Law*, pp. 64-65.

⁷⁸ Al-Zarqa, *al-Fiqh al-Islâmî Fi Sawbih al-Jadid*, vol. I, pp. 185-86; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, p. 134; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 213-15.

⁷⁹ Ibn 'ûl-Qayyim al-Jawziyye, *I'lâm 'al-Muwakqî'in*, vol. I, pp. 20-23; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 132-40; Ali Hasan, *Nazratun Âmmah fi Târikh al-Fiqh al-Islâmî*, pp. 106-220; 'Izz al-Dîn, *Islamic Law*, pp. 11-13.

reason that Imam Mâlik based his legal arguments on their teachings. In the same way, the legal opinions of 'Abd Allah ibn Mas'ud and his companions, the judgments of the Khalifah 'Ali, Shurayh (77), and al-Sha'bi (104), and the Fatâwâ of Ibrahim al-Nakha'i (96) were the most acceptable to the people of Kûfah.⁸⁰

3.3.3 *The School of Ahl al-Athar and the School of Ahl al-Ra'y*

As we mentioned before, the origin of the *Fiqh Schools* goes back to the period of the *Sahâbah*. Among the *Sahâbah* were some who were inclined by nature to study the meanings of legal texts, to look after their distant objectives and the secrets of their legislation. Those *Sahâbah* were never afraid of providing legal opinions (*fatâwâ*) in accordance with their own opinions. These Companions included 'Umar ibn Al-Khattâb, 'Ali ibn Abu Tâlib and Abdul Allah Ibn Mas'ûd. And there were others who acted according to the surface meanings of the legal texts, and they were unable to produce *fatâwâ* according to their opinions, like 'Abdul Allah Ibn 'Umar, 'Abdul Allah ibn 'Amru ibn al-'As, and Al-Zubeir ibn al-'Awâm. Some modern scholars call these schools proto-traditionalism and rationalism.⁸¹

Over the course of time, the schools of Hijaz and Baghdad converted to schools of *hadîth* and *ra'y*. Ibn al-Qayyim has mentioned many jurists from Medina, Mecca, Basra, Damascus, Egypt, Qayrawan, Andulus, Yemen, and Baghdad.⁸² This truth may become all the more intelligible when we mention the emergence of two informal schools of legal thought, the rationalists or *ahl al-ra'y*, and the traditionists or *ahl al-hadîth*, and the appearance of differences between them concerning both source methodology, and issues of case law. While it is true that both of these schools had their roots in the approaches of the preceding two generations, it was at this time that their differences in matters of *fiqh* become clear; and it was at this time that people began grouping themselves on the basis of their differences in deriving legal points from the sources.

3.3.3.1 The School of the People of *Hadîth*

The school of *Ahl al-Hadith* was a continuation of the school of those *Sahâbah* whose fear of contradicting the letter of the source texts *nusûs* made them circums-

⁸⁰ Al-Dahlawi, *Hujjatullah al-Balighah*, vol. I, pp. 205-308.

⁸¹ Abdurrahman ibn Khaldun, *Târîkh ibn Khaldun*, vol. I, pp. 478; al-Zarqa, *al-Fiqh al-Islâmî Fi Sawbih al-Jadid*, vol. I, pp. 186-88; Hallaq, *The Origins and Evolution of Islamic Law*, pp. 74-6; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 215-24; Mu'awwadh and Abdulmawjûd, *Târîkh al-Tashrî' al-Islâmî*, vol. II, pp. 16-28.

⁸² Ibn 'ûl-Qayyim al-Jawziyye, *I'lam 'al-Muwaqqi'in*, vol. I, pp. 19-23.

pect to the point where they never went any further than the texts. This was the case, by and large, with 'Abd Allah ibn 'Umar ibn al-Khattab, 'Abd Allah ibn 'Amr ibn al-'As, al-Zubayr, and 'Abd Allah ibn 'Abbas.

This school was established in Medina, which was the source and cradle of the *Sunnah*, the place where the *Sahâbah* were brought up along with their followers, and the refuge of the *Fuqahâ*. We call them *ahl al-athar* (supporters of narrations) too. It was called so for the following reasons: 1) it was much more concerned with collecting the *Ahâdîth* and information along with the traditions/deeds and sayings of the *Sahâbah* and their followers; 2) it was the first school that recorded the *Sunnah* and purified it of the fabricated *Ahâdîth*.⁸³

This school was characterized by the following principles: 1) reliance on the Qur'an in instances of deduction; 2) resorting to the *Sunnah* in case the legal position of a given matter is not mentioned in the Noble Qur'an; 3) working in accordance with the sayings of the *Sahâbah* and their followers when no legal text is found (in the Qur'an and the *Sunnah*) on a given matter; 4) this school did not deviate from the principle matters and did not suggest occurrences and then determine their positions. It was characterized by its *fiqh*, which was realistic, and by its *fatâwâ* which were delivered only if something came up; 5) it did not deal with *fiqh* matters in accordance with their opinions.⁸⁴

'Umar ibn Abdul Azîz used to ask (consult) the '*ulamâs* of Medina and to request legal opinions, and so did Abu Ja'far al-Mansûr who asked the '*ulamâs* of Hijaz to go to Iraq to promulgate the *Sunnah*. Among those '*ulamâs* were Hishâm ibn Urwa, Muhammad ibn Ishâq, and Yahia ibn Sa'îd al-Ansârî. The school of *Hadîth* was spread in the Maghreb and Khorasân in Persia and in many other countries.⁸⁵

The school of *Ahl al-Hadîth* became widespread in the Hijaz for many reasons. The most important reasons perhaps were the great number of *Hadîth* and other narrations known to the people of that area, and the fact that the region was more stable after the seat of the *Khilâfah* had been moved and, as a result, most of the political activity had been transferred, first to Damascus, then to Baghdad. The Imâm of Medina, Sa'id ibn al-Musayyab, once noted that the people of Mecca and Medina had not lost much of the *hadîth* and *fiqh*, because they were familiar with the *fatâwâ* and reports of Abu Bakr, 'Umar, 'Uthman, 'Ali (before he became *Khalîfah*), 'Aishah, ibn

⁸³ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 69-70; Mawsû'ah al-Adyân al-Muyassarah (Beirut: Dar al-Nafâ'is, 2002), p. 31; Jasser Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law* (London: The International Institute of Islamic Thought, 2008), p. 61.

⁸⁴ Abdurrahman ibn Khaldun, *Târikh ibn Khaldun*, vol. I, p. 478.

⁸⁵ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 27-8; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 225-29.

‘Abbas, ibn ‘Umar, Zaid ibn Thâbit and Abu Hurayrah, and thus did not need to use *Ra’y* in order to derive law.

Among the well-known *‘ulamâs* of this school were the following: Mâlik ibn Anas, Sufian al-Thawrî, Sa‘îd ibn al-Musayyab, who was called “the *Faqîh* of the *Fuqahâ*” (the most learned of the learned people), al-Awzâ‘î, El-Ayâd ibn Sa‘ad, Sufian ibn ‘Uyainah, Ibnu Jarir al-Tabari and Ahmed ibn Hanbal.⁸⁶

3.3.3.2 The School of the People of Opinion (*Ahl al-Ra’y*)

Ahl ar-ra’y is an Arabic term meaning “people of opinion.” *Ahl al-ra’y* is a school of law that formed aside to *ahl al-hadîth*. It first appeared in Kufa in Iraq and was called that because its *Fuqahâ* relied more on opinions and analogy in demonstrating legal positions, and they deviated from principle matters and suggested occurrences before they actually happened.⁸⁷ The school of *Ahl al-ra’y* was an extension of the school of ‘Umar and Abd Allah ibn Mas‘ud who, among the *Sahâbah*, were the most wide-ranging in their use of *Ra’y* (lit. opinion). In turn, ‘Alqamah al-Nakha‘î (70/689), the uncle and teacher of Ibrahim al-Nakha‘î, was influenced by them. Ibrahim then taught Hammad ibn Abu Sulayman (120/738) who, in turn, was the teacher of Abu Hanifah.⁸⁸

The principles upon which this school was based are: 1) reliance on the Qur‘an and the *Sunnah*; 2) use of analogy (*qiyâs*) and opinion, and deepening their understanding of the indications of the legal texts; 3) deviating from the principle matters and suggesting occurrences in order to find their positions. They consider the deeds and sayings of the *Sahâbah* a source for Islamic Law but verify them by legal criteria. Imâm Au Hanîfa summarized their methodology: “I accept what existed in the Qur‘an and *Sunnah* without hesitation; I should verify anything coming from the *Sahâbah*; but if you mention *Tâbi‘în* I am a man and they are men too.”⁸⁹

The school of *Ahl al-Ra’y* gained currency in Iraq. The scholars of this group thought that legal interpretations of the *Sharî‘ah* should have a basis in reason, should take into account the best interests of the people, and should be backed by discerna-

⁸⁶ Zaidan, *al-Madkhal Li Dirâsah al-Sharî‘ah al-Islâmiyyah*, pp. 132-40; Ali Hasan, *Nazratun Âmmah fi Târikh al-Fiqh al-Islâmî*, pp. 106-220; Hallaq, *The Origins and Evolution of Islamic Law*, pp. 74-76; Auda, *Maqâsid al-Sharî‘ah as Philosophy of Islamic Law*, p. 64.

⁸⁷ Mu‘awwadh and Abdilmawjûd, *Târikh al-Tashrî‘ al-Islâmî*, vol. II, pp. 70 ff; Ibn ‘ul-Qayyim al-Jawziyye, *I‘lâm ‘al-Muwakqî‘în*, vol. I, pp. 42-61.

⁸⁸ Cf. Melchert, *The Formation of the Sunnî Schools of Law, 9th-10th Centuries*, pp. 41ff.

⁸⁹ ‘Abd-al-‘Azîz ibnA. al-Bukhârî, *Kashf al-Asrâr* (Beirut: Dâr al-Kutub al-Ilmiyyah, 1997), vol. I, pp. 29-33; Zaidan, *al-Madkhal Li Dirâsah al-Sharî‘ah al-Islâmiyyah*, pp. 132-33; Hallaq, *The Origins and Evolution of Islamic Law*, pp. 74-76.

ble wisdom. Indeed, these scholars felt it was their duty to uncover these meanings and the wisdom behind the laws, and to make the connection between them so that if the reasons for any law were to lose relevance with the passing of time and the changing of circumstances, the law would no longer be valid. If they found the reasons behind the law, they sometimes preferred to cite arguments based on an analytical treatment of those reasons. Thus, in many cases, reason would be accorded legalistic preference when such reasoning conflicted with the evidence of certain categories of *hadīth*.

Ahl al-Ra'y often used to criticize *Ahl al-Hadith* for having little intelligence and less *fiqh*-understanding; while *Ahl al-Hadith* claimed that the opinions of *Ahl al-Ra'y* were based on no more than conjecture, and that they had distanced themselves from the necessary circumspection in those matters of religious significance which could only be ascertained through recourse to the source-texts.⁹⁰

In fact, *Ahl al-Ra'y* agreed with all Muslims that once a person has clearly understood the Sunnah, he may not reject it in favor of what is no more than someone's opinion. Their excuse in all those cases in which they were criticized for contradicting the Sunnah is simply that they did not know any *Hadith* concerning the matter in dispute, or that they did know a *Hadith* but did not consider it sound enough owing to some weakness in the narrators or some other fault they found in it (a fault which perhaps others did not consider to be damaging), or that they knew of another *Hadith* which they considered sound and which contradicted the legal purport of the *Hadith* accepted by others. Moreover, *Ahl al-Hadith* agreed with *Ahl al-Ra'y* on the necessity of having recourse to reason whenever a matter occurs for which there is no specific ruling in the source texts. Still, in spite of these areas of agreement, the conflict and tension between the two groups remained acute.

The spread of this method in Iraq was helped by the numbers of *Sahābah* influenced by the methods of 'Umar. Among them were Ibn Mas'ūd, Abu Musa al-Ash'arī, 'Imran ibn Husayn, Anas ibn Mālīk, ibn 'Abbas and others. The spread was also assisted by the transfer of the *Khilāfah* to Iraq, and the fact that 'Ali and his supporters settled there.

Among its famous 'ulamās was Abu Hanīfa En-Nu'mān, Rābiah al-Ra'y, Ibn-i Abu Laila, Süfyân-ı Thawrî and disciples of Abu Hanīfa Muhammad ibn El-Hassan, Abu Yusuf and Zufar.⁹¹

⁹⁰ Eerik Dickinson, *The Development of Early Sunnite Hadith Criticism: the Taqdima of Ibn Abī Ḥātim al-Rāzī (240/854-327/938)*, (Leiden: Brill, 2001), pp. 3-5.

⁹¹ Zaidan, *al-Madkhal Li Dirāsah al-Sharī'ah al-Islāmiyyah*, pp. 132-40; Ali Hasan, *Nazratun Āmmah fi Tārīkh al-Fiqh al-Islāmī*, pp. 106-220; al-Qattān, *Tārīkh al-Tashrī' al-Islāmī*, pp. 225-27; Auda,

3.4 The Period of *Mujtahidîn* (120-350/738-960)

This period fits the last years of Umayyads and the first years of the Abbasids. We should add the period of Qarakhanis as first Muslim Turkish state to this period. In this period most *fiqh* schools were found and established their principles. There were at least twelve large and famous *mujtahids* during this period: Sufian ibn 'Uyainah (Mecca), Mâlik ibn Anas (Medina), Hasan al-Basri (Basra), Abu Hanîfa, Süfyân al-Thawrî (Kûfah), Avza'î (Damascus), Şâfi'î, Lays ibn Sa'd (Egypt), Ishak ibn Râhuveyh (Nisâbur), Ahmed ibn Hanbel, Davud-u Zâhirî ve Ibn-i Jarir al-Tabari (Baghdad).⁹²

The *Fuqahâ* of the period took the *Hadith* of the Prophet, the decisions of the early judges, and the legal scholarship of the *Sahâbah*, the *Tâbi'în* and the third generation, and then produced their own *Ijtihâd*. In this period the sources of Islamic jurisprudence were the Qur'an and the *hadîths*, along with the scholarly consensus (*ijmâ'* =based on the first two). To issue a ruling based on them, a scholar is needed to tell whether a question has been answered unequivocally by these sources, and to issue a verdict based on similar cases if it has not. To do all this, the scholar must have encyclopedic knowledge of the sciences of the Arabic language, the Qur'an, *hadîths*, and sayings from previous scholars along with their reasoning. Finally, he must be very exacting, fearful of making a mistake, and have radiating intelligence.⁹³ Moreover, it became their practice to cite the opinions of the *Sahâbah* and *Tâbi'în* as evidence. Essentially, there were two reasons for this: 1) Such opinions were actually *Hadîth* of the Prophet which had been narrated by one of the *Sahâbah* or the *Tâbi'în* who had, for fear of misquoting, not dared to attribute the *Hadîth* to the Prophet. 2) The other likelihood is that such opinions were derived by the *Sahâbah* from the texts of *Hadîth*, and represented their own understanding of the Sunnah.

A scholar of this rank, called a *mujtahid*, is very rare. Moreover, because of the gravity of the task, the early generations of Muslims were extremely particular about the qualifications of such scholars. Of the Companions of the Prophet only around ten to thirty of them were *mujtahids*.

If it was recognized among the early generations that a person was a *mujtahid*, he would naturally attract many students. Over time, however, the students of four scholars in particular, those of Abu Hanîfa, Mâlik, al-Shâfi'î and Ahmad ibn Hanbal multiplied. This was because they were the top scholars of their time; they mastered

Maqâsid al-Sharî'ah as Philosophy of Islamic Law, p. 63; The Committee, *Mawsû'ah al-Adyân al-Muyassarâh*, p. 114.

⁹² Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 32-3.

⁹³ See Hallaq, *The Origins and Evolution of Islamic Law*, pp. 79-80.

the Qur'an and *hadīths* more thoroughly than others. Their proofs and reasoning for their verdicts were impeccable.

Their top students, some of whom were *mujtahids* themselves, relayed their sayings and reasoning to the next generation and answered new questions based on the methodology of the founder. They would also weed out the weak verdicts of the founder, if they were convinced that he would have changed his verdict based on what they had as evidence. This process continued from generation to generation. Passing through the hands of their scholars, the four schools became highly developed and documented; they had authenticated verdicts for most issues one would encounter and sophisticated and comprehensive reasoning with respect to the Qur'an and *hadīths*.

Eventually all students of jurisprudence would learn through these schools, because they became the most effective and reliable way of learning the teachings of the Prophet. Moreover, caution dictates that one should go by the verdicts that thousands of experts on the Qur'an and *hadīths* had scrutinized and accepted over hundreds of years within these schools.

Adherence to these schools preserves the unity among Muslims by preventing too many scattered and weak opinions or impostors claiming to be *mujtahids*. They have now been evaluated and tested for more than 1100 years since their establishment. This means that the remaining differences of opinion between these schools exist for very good reasons; the right answer cannot be known with complete certainty.⁹⁴

Muslim scholars have described this period as "*the Golden Age of Islamic Law*," "*The Age of the Codification of Fiqh*," and the "*Blossoming Age of Fiqh*." This period had witnessed the maturation of both the judiciary and legal teachings, since all the essential features of these two areas acquired their final shape.

There are many reasons for referring to this period in that way. We would like to mention some of them:

A) The appreciation and moral support from statesmen to scholars constitute the main reason. For example, Imâm Mâlik (179/795) was the first to undertake the comprehensive and systematic compilation of *hadīth*. His work is known as *al-Muwatta'*. Abbasid Caliph al-Mansûr asked him to declare his book an official law book for Muslims, but he declined. And Caliph Harun al-Rashid appointed Imâm Abu Yusuf Qâdhî al-Qudhât and requested that he record all Islamic financial rules as *Kitâb al-Kharâj*.⁹⁵

⁹⁴ Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 141-45; al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid*, vol. I, pp. 199-202; Ali Hasan, *Nazratun Âmmah fi Târikh al-Fiqh al-Islâmî*, pp. 106-220.

⁹⁵ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 35-6.

B) During this period there was no strict affiliation with any legal school and everybody was busy discovering the religious and legal principles of Islam. There was perfect freedom of thought (*hurriyah al-ra'y*). Everybody would express his opinion within methodology of Islamic law.⁹⁶

C) Muslim scholars were discussing the problems among themselves and with their disciples everywhere. For example, *fiqh* or Islamic Law was systematically studied by Abu Hanîfa's students under his expert guidance. A large number of his devoted and highly intelligent students (at least more than forty) worked under him for thirty years, and it is the labor of these students that gave us the Hanafî school of law. Imâm Abu Hanîfa was the first of the Imâm's to advocate the use of "reason" in the consideration of religious questions based on the Qur'an and the *Sunnah*. He was also the first Imâm to arrange all the subjects of Islamic law systematically.

D) The borders of the Muslim state spread eastward to China and westward to the Atlantic Ocean, and this large area saw several conflicts and questions about problems. Plus, Islam's encounters with different cultures and faiths have encouraged improvements in every field.

E) Their ways of dealing with the *Sunnah* underwent a great deal of change. Essentially, this difference was the outcome of political differences that accompanied the emergence of various sectarian and philosophical factions, such as the *Shî'ah* and *Khawârij*, whose attitude to the *Sunnah* was different. The more important reason for improvements was that the codification of the *hadîths* was completed. For this reason, the narration of Hadith and *Sunnah* became popular, whereas this had not previously been the case. For example, in *musannaf* collections, *hadîths* are recorded under various headings dealing with juridical subjects such as *al-Sihâh al-Sittah* (The Six Authentic Books of *Hadîth*), namely the compilations of al-Bukhârî (256/870), Muslim (261/874), An-Nasa'i (303/916), Abu Dawud (275/889), At-Tirmidhi (279/892) and Ibn Mâjah (273/886).⁹⁷

F) Owing to the divisions which had arisen, *ijmâ'* was no longer a possibility in this period. Basically, this was because every group mistrusted the scholars of every other group, and would no longer accept any of their opinions, whether they agreed or disagreed with them. In addition, the *Fuqahâ* from among the *Sahâbah* had become scattered all over the Islamic world, so that it was no longer possible for them to meet in order to discuss matters.

G) At that time, since people's minds, hearts and spirits were directed with all their strength towards understanding the wishes of God, the discussions, conversa-

⁹⁶ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 37-8.

⁹⁷ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 39-40.

tions, events, and circumstances of social life were all concerned with that. Since they occurred in accordance with those wishes, whoever had high ability, his heart and nature unconsciously received instruction in knowledge of God from everything. He received knowledge from the circumstances, events, and discussions that took place at that time, as though everything became a teacher for such a person, and inculcated his nature and disposition with the preparatory knowledge for independent judgments. That natural instruction illuminated him to such a degree that he was almost capable of interpreting the law without acquiring the knowledge to do so, to be illuminated without fire. Thus, when a capable person who had received such natural instruction in this way began to work at interpreting the law, his capacity, which had become like a match, manifested the mystery of *Light upon Light*; he became qualified to interpret it (*mujtahid*) swiftly and in a short time.⁹⁸

It is for the above reasons that Islamic law blossomed and many schools of law and thought arose.⁹⁹

⁹⁸ Bediuzzaman, *Words*, Twenty-Seventh Word, pp. 496-7.

⁹⁹ Akgunduz, *Türk Hukuk Tarihi*, vol. I, pp. 122-23; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 141-45; al-Zarqa, *al-Fiqh al-Islâmî Fi Sawbih al-Jadid*, vol. I, pp. 199-202; Ali Hasan, *Nazratun 'Âmmah fi Târîkh al-Fiqh al-Islâmî*, pp. 106-220.

4 LAW ('AMALÎ) SCHOOLS AND THEOLOGICAL SCHOOLS (I'TIQÂDÎ) IN ISLAM (MADHHABS)

4.1 General Considerations

The verbal noun of *madhhab* is a “way of thinking, persuasion” or “a method” that is followed and, more specifically, the opinion or idea that one chooses to adopt. As a term of Islamic law, we could say that it is a method of interpreting religious material in the three major areas: belief, religious practice and law. The discussions that raged in the early period of Islam with regard to religious and legal questions, such as the use of *qiyâs*, or political issues, like the caliphate, resulted in grouping along certain lines. We call those lines *madhhab*. *Madhhab* literally means road; but, as an Islamic term, it means school of thought or law, religious sect, denomination.¹

We should be aware of and not confuse the two kinds of schools: schools of thought (*i'tiqâd*) and schools of law (*fiqh*).² Most Muslims – and some scholars as well – are confused about this subject.³ Therefore, we will first divide all schools in Islam into two groups:

A) **Schools of thought** (*al-madhâhib al-i'tiqâdiyyah*) are the paths people follow to the Holy Qur'an and the Holy Prophet Muhammad. Obviously, these schools of thought were founded a considerable time after the death of the Prophet and, in fact, never took shape until the time of the Umayyad Caliphate. But after the time of *Khulafâ al-Rashidûn*, new common phrases arose and Muslims divided into two groups on *usûl al-dîn*, e.g. basics of faith:

1) *Ahl al-sunnah wal-jamâ'ah* schools that have been described by Sunnî scholars as *al-Madhhab al-Haq* (Righteous School).

2) *Ahl al-Bid'ah* schools that are described as heretical or *al-Madhhab al-Bâtîl* by Sunnî Muslim scholars. To describe these schools of thought as Sunnî or Shi'î is possible; but one cannot describe schools of law as either Sunnî or Shi'î.

B) **Schools of Law** (*al-madhâhib al-'amaliyyah-fiqhiyyah*) are Islamic schools of law or *fiqh* (religious jurisprudence). There were many such “schools” in the first 150 years of Islam. In fact, several of the *Sahâbah*, or Companions of Muhammad, are

¹ Jasser Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law: A Systems Approach* (London: The International Institute of Islamic Thought, 2008), pp. 69-70; Nicolas Aghnides, *Islamic Theories of Finance: With An Introduction to Islamic Law and a Bibliography* (New York: Columbia University, 1916), pp. 133-35.

² Cf. Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*, pp. 69-70.

³ See Christopher Melchert, *The Formation Of The Sunnî Schools Of Law, 9th-10th Centuries CE* (Leiden: Brill, 1997). The term “Sunnî Schools” is technically incorrect.

credited with founding their own. The prominent Islamic jurisprudence schools of Damascus in Syria (often called *Awza'iyya*), Kufa and Basra in Iraq, and Medina in Arabia survived as the Mâlikî *madhhab*, while the other Iraqi schools were consolidated into the Hanafî *madhhab*. The Shâfi'î, Hanbalî, Zâhirî and Ja'farî schools were established later.

We should, again, remember that nobody can describe any law school as Sunnî or Shî'î, *bâtil* or *haqq* or otherwise because the question of *fiqh* does not have any relation with faith. A Muslim may be Mu'tazilî in faith but Hanafî in *fiqh*, like Zamakhshari, the author of *al-Kashshâf* and *Al-Jassâs* the author of *Ahkâm al-Qur'an*.⁴ There are exceptions only with respect to Shî'a and some *Fiqh Schools*. Shî'a is a school of thought, whereas Ja'fariyyah and Zaidiyyah are *Fiqh Schools*. But everybody who was affiliated with Shî'a was also affiliated with either the Ja'fariyyah or Zaidiyyah schools. Wrong descriptions of schools can often be found in books, articles and websites. For this reason we have divided schools in Islam into groups and will explain each subgroup with respect to its appropriate place in these groups. That is, each group acted appropriately according to their own *Ijtihâd*. That is why none of them can be held to account. Those who erred received one *thawâb*. Those who discovered what was right received two *thawâbs*. It is not even right to say they erred. Those who erred should also be remembered in a favorable way. In a matter on which the judgments of the four *madhhabs* differ from one another, only one of the judgments is correct. Those who do this correctly will be given two *thawâbs*, and those who act according to one of the incorrect judgments will be given one *thawâb*.⁵

We should acknowledge that all the different law schools and schools of thought in Islam have a righteous point in their views as a nucleus even if we classify them as *ahl al-bid'ah*. However, they have exceeded this righteous point for political or personal reasons. For example, *shî'ah* love *ahl al-bait* due to Qur'an commanding Muslims to love *ahl al-bait*. This is a righteous point. Yet, their love exceeded the limits of Qur'an and depended mostly on the hate of Abu Bakr and 'Umar. Likewise, Wahhabites and Khârijites adhered to the pure sacred texts and defended the pure unity of God (*tawhîd*); but they have exceeded the limits of Qur'an and *Hadith*, and thus, destroyed many sacred places.⁶

⁴ Cf. Christopher Melchert, *The Formation of the Sunnî Schools of Law, 9th-10th Centuries*, (Leiden: E.J. Brill, 1997), pp. XIII-XV.

⁵ Ahmed Akgunduz, *Türk Hukuk Tarihi*, vol. I (Istanbul: OSAV, 1995), p. 124; *Sahîh Muslim*, Kitâb Fada'il al-Nabi.

⁶ Bediuzzaman, Said Nursi, *Mektûbât*, Twenty-Eighth Letter, Sixth Section, (Istanbul: Sozler Publications, 2004).

4.2 The Fiqh Schools (Madhhabs) and Their Founders

The term *madhhab* is used in Islamic law in three ways: *First*, it can refer to a particular opinion of a Muslim jurist. *Second*, it can refer to a combination of the principles underlying a group of derivative cases. *Third*, it can refer to a *mujtahid*'s individual opinion as the most authorities in the collective doctrinal corpus of the school, irrespective of the question if this *mujtahid* was the school's so-called founder.⁷

The second and third Islamic centuries could be called the "era of Imâms." Many Islamic law schools were named after Imâms who were alive at that time. Islamic jurisprudence has developed over the course of fourteen centuries. Over that span of time, various schools of jurisprudence have emerged, each with its own interpretation and application of the *Sharî'ah*. Many schools splintered further, creating schools that followed different interpretive approaches and applications. The flourishing abundance of ideas and views attests to the intellectual depth and breadth of Islamic jurisprudence. However, nothing precludes a given state from codifying the *Sharî'ah* so as to provide for more certainty regarding the law and clarity and consistency in its application.⁸

Imâms left legacies and large numbers of legal opinions and students behind. These groupings along *fiqh* lines have been the ones that have received the most recognition and adherence. Consequently, they have been practically the only groupings to spread and survive to the present, and are known as the *fiqh madhhabs* or schools. The differences between these schools are by no means confined to matters of law, even though that is primary, since they bear on subjects as diverse as metaphysics and politics. In fact, they relate to all the various subjects on which *Sharî'ah* had something to say, namely to every matter that excited human interest at that time.⁹

Each Imâm developed procedures for *ijtihâd*. The most important of the *fiqh* schools were the ones founded by Abu Hanîfa (150/767), Imâm Mâlik (179/795), al-Shâfi'î (204/820), Ahmad ibn Hanbal (241/855), Dâwud ibn 'Ali (268/881), al-Awza'î (157/774), Sufian al-Thawrî (161/778), Abu Thawr (240/854), Imâm Ja'far al-Sâdiq (148/765), Zaid ibn 'Ali (121/739), 'Abdullah ibn Ibâdh (86/705), and al-Laith ibn Sa'ad (175/791). Each is considered to be a full *mujtahid* and is supposed to have had his own system of theory and applications of *fiqh*.¹⁰

The four schools of law, Hanafi, Mâliki, Shafi'î and Hanbali, are identical in ap-

⁷ Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2007), pp. 150-53.

⁸ Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*, p. 145.

⁹ Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*, p. 145; Aghnides, *Islamic Theories of Finance*, pp. 133-35.

¹⁰ Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*, p. 65.

proximately 80 % of their legal conclusions. Variances in the remaining questions are traceable to methodological differences in understanding or authentication of the primary textual evidence. The differences between the various *fiqh* schools, as already anticipated in the chapters on *ijmâ'* and *ijtihâd*, relate chiefly to the applications of *fiqh*, and for we will see in the theory of *fiqh* (*usûl al-fiqh*) they all practically follow the same principles. Al-Sha'rânî has compared the several *Fiqh Schools* to so many roads, all of which lead to the same destination. Thus they never called one another heretical (*kâfir*) and usually allow a shift in allegiance from one *Fiqh School* to another. Of the many schools that existed, only six were able to obtain a following. They are known as the six followed (*matbû'ah*) schools: the Hanafîte, Mâlikîte, Shâfi'îte, Hanbalîte, and those of al-Thawrî and Dâwud. The first four are those that had the largest following and have survived to the present; the last two did not survive beyond the seventh century of the *Hijrah*. The rest of the *Fiqh Schools* had little or no following. We will discuss the most important *Fiqh Schools* below. We should add the Ja'farî and Zaidî school whose founders come from Shî'a. They are followed schools led by Shî'î people.¹¹

Do Muslims need different law schools? The answer is not easy, but we could relate an opinion about this problem:

If you say: The truth is one; how can the different ordinances of the four and twelve schools be true?

The Answer: The same water governs in five different ways in five ill people of different disposition, thus: for one, the water is a cure for his illness, and according to medicine, necessary. For another, it is like poison for his sickness and harmful, and medically prohibited. For another, it causes a small amount of harm, and is reprehensible medically. For another the water is beneficial and without harm; according to medicine that is Sunnah for him. And for yet another it is neither harmful nor beneficial; he can drink it with good health, and for him it is medically permissible. Thus, here the truth has become numerous; all five are true. Are you able to say: "The water is only a cure, only necessary, and it governs in no other way?"

Similarly, impelled by Divine wisdom, the Divine ordinances change according to the schools of law and those who follow them, and they change as truth, and all are true and right. For example, since, in accordance with Divine wisdom and determining, the majority of those who follow Imâm Shâfi'î are closer to village life and nomadism than the Hanafîs, and are lacking in social life, which makes the community like a single body, each person recites the *Fâtiha* behind the prayer-leader so as to himself express his pains at the Court of the Dispenser of Needs and utter his private wishes. And this is absolutely right and pure wisdom. However, since most Islamic governments favored

¹¹ Abdurrahman I. Doi, *Sharî'ah: Islamic Law* (London: Ta-Ha Publishers, 2008), pp. 131-35; Hallaq, *The Origins and Evolution of Islamic Law*, pp. 153-67.

the school of Imâm-i A'zam, the great majority of those who follow that school are closer to civilization and town life and more fitted for social life. Thus, the community becomes like a single individual and one man speaks in the name of all; all affirm him with their hearts and bind their hearts to his and his word becomes the word of all; according to the Hanafî school, the Fâtiha is not recited behind the prayer-leader. And its not being recited is absolutely right and pure wisdom.¹²

4.2.1 *The Hanafî School and Its Founder: Imâm A'zam*

Abu Hanîfa Nu'mân ibn Thâbit was born in Kufa (80/699) and died in Baghdad (130/767). His grandfather was brought from Persia to Kufa as a slave and later obtained his freedom. His nickname was Imâm A'zam=the Greatest Leader. His greatest master was Hammâd ibn Sulayman (120/738). His teachers include Ibrahim al-Nakha'i and Qâdhî Shûrâyh, 'Alqamah, Masrûq and al-Aswad of the Tâbi'in. Of the Sahâbah we should mention 'Abdullah Ibn Mas'ûd and 'Ali ibn Abu Tâlib. These teachers were leaders of the school of *ra'y* as well. According to the historian Ibn Khallikân¹³, Abu Hanîfa was born early enough to have met four of the Companions, namely, Anas ibn Mâlik, and 'Abdallah ibn 'Awf neither of whom resided in Kufa, and two others. But he never saw them nor received traditions about the Prophet from any of them. His disciples have claimed the contrary. Ja'far ibn Rabi'ah said that he attended the classes given by Abu Hanîfa for five years and never met a man who would remain silent for as long as he did; but would, when questioned on [a point of] jurisprudence, launch into a flow of words as copious as a torrent. He was a master of the highest rank also in the art of drawing conclusions from analogies (*qiyâs*).¹⁴

Abu Hanîfa practiced the method of teaching in early Islam known as the *halqa* (study circle), in which those who sought knowledge from a master sat around him in a circle and were the recipients of his discourse. Imâm Abu Hanîfa frequented the circle of Imâm Ja'far al-Sâdiq and benefited from it. Sometimes they discussed a problem for sixty days; the decisions were written down by Imâm Muhammad and Imâm Abu Yusuf. His works included classifications of Islamic law according to *bâbs* (parts)

¹² Said Nursi, Bediüzzaman, "Twenty-Seventh Word, Conclusion," *The Words*, trans. Shukran Wahide, (Istanbul: Sozler Publications, 2007), p. 501.

¹³ Ahmad ibn Muhammad ibn Khallikân, *Wafayât al-A'yân wa Anbâ'u Abnâ' al-Zaman*, (Beirut: Dâr al-Kutub al-Ilmiyyah, 1998), vol. IV, pp. 576-85.

¹⁴ Tashkopruzadeh, *Miftâh al-Sa'âdah wa Misbâh al-Siyâdah* (Beirut: Dâr al-Kutub al-Ilmiyyah, 1985), vol. II, p. 174; Mannâ' al-Qattân, *Târikh al-Tashrî' al-Islamî* (Beirut: al-Risâlah, 1987), pp. 265-70; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, Ali Muhammad al-Mu'awwadh, and Âdil Ahmad Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vols. I-II, (Beirut: Dâr al-Maktabah al-Ilmiyyah, 2000), vol. II, pp. 73-80; Auda, *Maqâsid al-Shari'ah as Philosophy of Islamic Law*, pp. 65-66; Zuhaylî, *al-Fiqh al-Islamî*, vol. I, pp. 41-5.

and *fasls* (chapters). The number of such legal decisions reached 63,000 and existed in fiqh books.

The genius of Imâm Abu Hanîfa lies in his view of *fiqh* as a dynamic vehicle available to all people in all times. He saw Islam as a universal idea accessible to all races everywhere and in all times. *Fiqh* was not a static code applicable to only one situation in one place but a mechanism that would simultaneously provide stable underpinnings to Islamic civilization and would also serve as a cutting edge in its debate with other civilizations. He saw that the rigorous and exacting methodology of the Madinite School would suffocate the ability of jurists to cope with unforeseen challenges presented by new situations. Therefore, he expanded the basis for sound legal opinions.

According to Imâm Abu Hanîfa, the sources of *fiqh* are: (1) the Qur'an, (2) the *Sunnah* of the Prophet, (3) *ijmâ'* (consensus) of some, not necessarily all, of the Companions, (4) *Qiyâs* (deduction by analogy to similar cases that had been decided on the basis of the first three principles) and (5) *Istihsân* (creative juridical opinion based on sound principles). With the acceptance of *Istihsân* as a legitimate methodology, Imâm Abu Hanîfa provided a creative process for the continual evolution of *Fiqh*. No Muslim jurist would be left without tools for coping with new situations and fresh challenges from as-yet unknown future civilizations.¹⁵

One other term needs clarification here, i.e. *Ijtihâd* (root word j-h-d, meaning struggle). *Ijtihâd* is the disciplined and focused intellectual activity whose end result is *ijmâ'* or *qiyâs* or *Istihsân*. *Ijtihâd* is a process. The Hanafî school provides the greatest latitude for *Ijtihâd*. However, there are differences in emphasis. In the Ja'farî school, the emphasis is on the *Ijtihâd* of the Imâms. In the Hanafî school the *Ijtihâd* of the Companions of the Prophet is emphasized, but the *Ijtihâd* of the learned jurists is also acceptable. There are also differences between the Kufic schools of *fiqh* (such as that of Imâm Abu Hanîfa) and the Madinite schools of *fiqh* (such as that of Imâm Mâlik) in the latitude allowed for *Ijtihâd*. The *ijmâ'* or consensus of the Madinite School arises primarily through evidence (from the Qur'an) or correlation with the *Sunnah* of the Prophet. The requirements for *ijmâ'* or consensus in the Kufic schools are somewhat more liberal and include not only evidence from the Qur'an and the *Sunnah* of the Prophet, but also the *Ijtihâd* of the Companions or of learned jurists.¹⁶

Abu Hanîfa was a man of independent means and perfect character. He devoted

¹⁵ Ibn Khallikân, *Wafayât al-A'yân*, vol. IV, pp. 576-85; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 80-3; Al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 271-76.

¹⁶ Shamsaddîn Muhammad Al-Dhahabî, *Siyar A'lâm al-Nubalâ*, (Beirut: Al-Risâlah, 1982), vol. VI, pp. 390-403; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 174-94; Aghnides, *Islamic Theories of Finance*, pp. 138-40.

his life to the study of religion and law, delivering lectures in Kufa to his private circle of students. His opinion on legal matters was universally sought. He left no works apart from a small book on dogmatics and faith called *al-Fiqh al-Akbar*. His so-called *Musnad* was compiled by one of his students and contains the *hadîths* he used.¹⁷

It was Abu Hanîfa who occasioned the famous controversy regarding the use of opinion (*ra'y*) in legislation, and this activity brought him bitter attacks. The charge made by his enemies was that he emphasized the speculative element at the expense of the *hadîths*, whereas his disciples rightly maintained that he used *qiyâs* only when he could not find a provision in the *hadîths*. The truth is that "*Abu Hanîfa did not make an exception in the use of qiyâs but held that they all acted alike.*" We know that there was not much truth in the allegation that *qiyâs* meant the introduction of the use of *ra'y*. On the contrary, *qiyâs* curbed the inordinate and lawless use of *ra'y* as it was then practiced by all.¹⁸

It is true that Abu Hanîfa also introduced the principle of *Istihsân*, which was really a case of using *ra'y*, but all the schools have used that. The only difference between Abu Hanîfa and the rest was that Abu Hanîfa knew what he was doing and was not afraid of openly admitting it, while the others did the same thing in a more or less concealed way. The work of Hanîfa can hardly be overestimated, for he made the first attempt to codify Islamic Law, using *qiyâs* as one of his bases. In doing this Abu Hanîfa incidentally evolved a theory of law (*usûl al-fiqh*) for the first time. Abu Hanîfa's work was supplemented and completed by his intimate circle of disciples, especially Abu Yusuf, and Muhammad ibn al-Hasan.¹⁹

Here we should mention essential works of the Hanafî school. The writings of the *mujtahids*, like the *mujtahids* themselves, have been grouped by later Hanafîte jurists into three main categories.

1. The so-called *Usûl* (bases) or *Zâhir al-Riwâyah* (of reliable transmission) or *Zâhir al-madhhab* (the established teachings of the school). These are the views and opinions of Abu Hanîfa and his disciples Abu Yusuf, Muhammad ibn al-Hasan as well as of Zufar and Hasan ibn Ziyâd, which have been recorded in the books called by the same name, i. e., *Kutub Zâhir al-Riwâyah*. These books are the *Mabsût*, the *al-Jâmi' al-Kabîr*, the *al-Jâmi' al-Saghîr* and the *al-Siyar al-Kabîr*, *al-Siyar al-Saghîr*, and *al-Ziyâdât*, all written by Muhammad ibn al-Hasan, Abu Hanîfa's disciple.

2. The so-called *al-Nawâdir*. These are the views and opinions of the above jurists

¹⁷ Doi, *Sharî'ah: Islamic Law*, pp. 135-41.

¹⁸ Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 276-79; cf. ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn* (Beirut: Dar al-Nafâ'is, 2002), vol. I, pp. 61, 170.

¹⁹ Cf. Christopher Roederer and Darrel Moellendorf, *Jurisprudence*, (Lansdowne: Juta and Company Ltd, 2007), pp. 470ff.

recorded in other than the above-mentioned books, such as the *al-Kisâniyyat*, *al-Hârûniyyât*, *al-Jurjâniyyât*, and *al-Raqiyyat*; by the same Mubammad, the *Amâli* of Abu Yusuf, the books written by Hasan ibn Ziyâd, Zufar, etc.

3. Finally, the *Wâqi'ât*, namely the views of later *mujtahids*, like 'Isâm al-Dîn ibn Yusuf, ibn Rustam, Muhammad ibn Samâ'ah, Abu Sulaymân al-Jurjâni, Abu Hafs al-Bukhârî, etc. The first book of this kind was the *Nawâzil of Abu al-Laith al-Samarqandi*. It was followed by al-Nâtifi's *Kitâb Majmû' al-Nawâzil wa'l-Wâqi'ât*. Later writers, including Qâdhî khân, compiled works in which they put together the views contained in these earlier books. The best compendiums of the opinions of the first class (*usûl*) are the *Kâfi*, and the *Muntaqâ*. A commentary on the *Kâfi* has been written by al-Sarakhsi in a work called *al-Mabsût*. It is a large work in thirty parts.²⁰

We should present brief information about two important disciples of Imâm A'zam who have been included among the founders as well.

A) *Abu Yusuf, Ya'qûb ibn Ibrâhim*, (113/731-182/799), was by far the most important disciple of Abu Hanîfa. He was the one who wrote out the principles laid down by the master and occupied a position in relation to him that was very similar to that which Plato had to Socrates. Abu Yusuf held office as chief justice (*Qâdhî al-qudhât*) in Bagdad under the well-known caliph Hârûn al-Rashid, who sought his advice on the most important affairs of state. In answer to certain questions by the caliph concerning taxation and other matters of public law, Abu Yusuf wrote his famous *Kitâb al-Kharâj*, a valuable essay on those subjects. When Abu Hanîfa decided a point of law and all the jurists of his city were agreed on it, he told Abu Yusuf, "Write it down."²¹

B) *Imâm Muhammad ibn al-Hasan al-Shaybânî* (135/752-189/804-05) was the younger of the two disciples but was the more persistent by far. When Imâm al-Shâfi'î went to Bagdad, Muhammad ibn al-Hasan was there, and the two of them met frequently and discussed points of law in the presence of Hârûn-ar-Rashid. Al-Shâfi'î was (later) heard to say: "I never saw a person who, when questioned on a point that required reflection did not betray some uneasiness in his countenance; but I must accept Muhammad ibn al-Hasan." He also said: "The information that I learned by heart from Muhammad ibn al-Hasan would suffice to load a camel."²²

²⁰ Zuhaylî, *al-Fiqh al-Islamî*, vol. I, pp. 64-66; Muhammad Amin ibn 'Âbidîn, *Radd al-Muhtar*, vol. I (Cairo: Maktaba al-Halabî, 1966), pp. 50-51, 69-70; ibn 'Âbidîn, *Rasm al-Muftî (Majmû'ah Rasa'il ibn 'Âbidîn)*, (Istanbul: al-Matba'ah al-Âm'rah, 1325/1907), vol. I, pp. 10-21; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 279-81.

²¹ Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 211-17; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 84; Doi, *Sharî'ah: Islamic Law*, p. 141; Aghnides, *Islamic Theories of Finance*, p. 140.

²² Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 85.

Muhammad compiled the applications of the principles laid down by the master into a *corpus juris*, which served as a basis for many future books on the applications of *fiqh* and commentaries. This work constitutes the most authoritative sourcebook for the Hanafite doctrines. The titles of these books have been mentioned above.²³

Imâm Abu Hanîfa did not establish the school of *fiqh* named after him nor did he personally document his methodology. Writing was not common at that time and speaking was still the principal means of communication. Oration was the primary vehicle for instruction and teaching. The Arabic language, syntax and grammar were learned through memorization. Documentation was left to students and disciples of later generations. Specifically, it was not until the 11th century that the Hanafî school was fully elucidated and documented. The greatest among the Hanafî scholars were ‘Abdullah ‘Umar al-Dabbusi (1038), Ahmed Hussain al-Bayhaqi (1065), ‘Ali Muhammad al-Pazdawi (1089) and Abu Bakr al-Sarakhsi (1096).²⁴

Some Terms used in Books of Hanafite: There are some terms that should be understood by students and researchers in Hanafite fiqh books: 1) *Zâhir al-Riwâyah* (of reliable transmission) or *Zâhir al-madhhab* (the established teachings of the school). These are the views and opinions of Abu Hanîfa and his disciples Abu Yusuf, Muhammad ibn al-Hasan as well as of Zufar and Hasan ibn Ziyâd, which have been recorded in the books called by the same name, i. e., *Kutub Zâhir al-Riwâyah*. 2) There are some symbolic phrases in Hanafî books concerning them: *al-Imâm* means Abu Hanîfa; *Shaykhayn* (Two Masters) to Abu Hanîfa and Abu Yusuf; *Imâmayn* (Two Imams) to Abu Yusuf and Imâm Muhammad. *Sâhibayn* refers to the same and *al-Awwal* to Imâm A‘zam. *Al-Thâni* refers to Abu Yusuf and *al-Thâlith* refers to Imâm Muhammad.²⁵ 3) *al-Mutûn* or “*al-Mutûn al-Arba‘ah al-Mu‘tabarah*” (*The Four Authorized Texts*) are I) *al-Mukhtâr* by Majduddîn ‘Abdullah, II) *al-Wiqâyah* by Taj al-Sharî‘ah Mahmud, III) *Majma‘ al-Bahrain* by ibn al-Sa‘âti, IV) *Kanz al-Daqâ‘iq* by Hafiz al-Dîn of Nasaf.²⁶

From the 10th century on, the Hanafî school was patronized by the Abbasids in Baghdad who enjoyed the protection of the Seljuq Turks. The Turks loved the egalitarian disposition of Imâm Abu Hanîfa as well as the creative aspects of the Hanafî *fiqh*.

²³ Tashkopruzadeh, *Miftâh al-Sa‘âdah*, vol. II, pp. 217-22; Auda, *Maqâsid al-Sharî‘ah as Philosophy of Islamic Law*, p. 66; Agnides, *Islamic Theories of Finance*, pp. 140-41.

²⁴ Tashkopruzadeh, *Miftâh al-Sa‘âdah*, vol. II, pp. 224-36; Doi, *Sharî‘ah: Islamic Law*, p. 141; cf. Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries*, pp. 48ff.

²⁵ Akgündüz and Cin, *Türk Hukuk Tarihi*, vol. I, pp. 124-25; Abdulkarim Zaidan, *al-Madkhal Li Dirâsah al-Sharî‘ah al-Islâmiyyah* (Baghdad, Matba‘ah al-Ânî, 1977), pp. 155-59; Qinali-zâdah Ali Chalabi, *Tabaqât al-Mujtahidîn*, The Library of Sulaymaniye, Donated Manuscripts, No: 2172, p. 59/B; Muhammad Abu Zahra, *Abu Hanîfa* (Cairo: Dâr al-Fikr al-Arabî, 1997), pp. 5-20.

²⁶ Akgündüz, *Kulliyât*, p. 38, 77; Tashkopruzadeh, *Miftâh al-Sa‘âdah we Misbâh al-Siyâdah*, 2/236-58.

When they embraced Islam, they became Hanafīs and arch defenders of the school. The Turkish dynasties in the 11th and 12th centuries as well as the Ottomans endorsed the Hanafī *fiqh*. The Timurids, Turkomans and the Great Moghuls of India were its champions also. For these historical reasons the Hanafī school is the most widely accepted of the various schools of *fiqh* in the Muslim world today. Most Muslims of Pakistan, India, Afghanistan, Central Asian Republics, Persia (until the 16th century), Turkey, northern Iraq, Bosnia, Albania, Skopje, Russia and Chechenya follow the Hanafī *fiqh*. A large number of Egyptians, Sudanese, Eritreans and Syrians are also Hanafīs, even though, as we shall see later, for reasons rooted in geography the Mālikī and Shāfiʿī Schools are also well established there.²⁷

4.2.2 The Mālikī School and Its Founder: Imām Mālik

The period of the Companions of the Prophet had just come to end when Imām Mālik ibn Anas was born in Medina. Mālik ibn Anas was born in Medina (95/714) and died in Medina too (179/795). His masters are among the *ahl al-athar*, and we should mention some names like Imām Zuhri (124/742), Imām Nafiʿ (117/735) and Rabiʿah al-Raʿy (136/753). Mālik was considered to be a representative of the *hadīth* folk, notwithstanding the fact that he also used *qiyās*, although perhaps to a lesser extent than Abu Hanīfa. This is borne out by an examination of his collection of *hadīths*, called *al-Muwattaʿ*, the first orderly collection of law, where Mālik based his legal decisions partly on his personal opinion. Note this statement by ʿAbdallah Ibn Qaʿnab.²⁸

I went to Mālik ibn Anas, in his last illness and saluted him; I then sat down and, perceiving that he wept, I said: O Abu ʿAbdallah; what maketh thee weep?" and he answered, "O Ibn Qaʿnab, why should I not weep? By Allah! I wish I had been flogged and reflogged for every question of law on which I pronounced my opinion founded on my own private judgment."²⁹

Like all scholars of Islam, Imām Mālik was famous for his piety and integrity. He stood up courageously, and was prepared to suffer, for his convictions. When the governor of Medina demanded and forced people to swear allegiance to Khalīfah al-Mansūr, Imām Mālik issued a *fatwā* that such an oath was not binding because it was given under coercion. He based this opinion on the *hadīth*, "*The divorce of the coerced*

²⁷ Zaidan, *al-Madkhal Li Dirāsah al-Sharīʿah al-Islāmiyyah*, pp. 159-62; Qinali-zādah Ali Chalabi, *Tabaqāt al-Mujtahidīn*, The Library of Sulaymaniye, Donated Manuscripts, No. 2172, pp. 59-61; Muʾawwadh and Abdumawjūd, *Tārīkh al-Tashrīʿ al-Islāmī*, vol. II, pp. 97-100.

²⁸ Al-Qattān, *Tārīkh al-Tashrīʿ al-Islāmī*, pp. 282-87; .

²⁹ Al-Dhahabī, *Siyar Aʿlām al-Nubalā*, vol. VIII, pp. 48-135; Ibn Khalīkān, *Wafayāt al-Aʿyān*, vol. IV, p. 5; Aghnides, *Islamic Theories of Finance*, pp. 141-42.

does not take effect.”³⁰ This resulted in many people finding the courage to express their opposition, but he was arrested, found guilty of defiance, and publicly flogged.

The greatest contribution that Imâm Mâlik made was to record the practice of the people of Medina, their *fiqh* and *hadîths*, providing illustrations from the Prophet and his Companions. Having lived and worked in the city of Medina, the home of the *hadîth* folk, Mâlik occupies a conspicuous place in the teaching of *hadîths*. Thus, it is stated in the *Tahdhîb* that, according to al-Bukhârî, the most reliable chain of transmission is Mâlik, from Nâfi‘, from ibn ‘Umar. But, according to Abu Mansûr al-Tamimi, it is al-Shâfi‘î, from Mâlik, from Nâfi‘, from ibn ‘Umar from the Prophet. Among his teachers we could mention Abu Radim Nafi‘ ibn Abdurrahman (786), Nafi‘ mawla ibn ‘Umar (738), Ja‘far al-Sâdiq (814), Muhammad ibn Yahya al-Ansari (739), Abu Hazim Salamah ibn Dinar (757), Yahya ibn Sa‘id, Ib Shihab al-Zuhri (742), and Rabi‘ah al-Ra‘y (754). The teachers mentioned in *Muwatta’*, from whom he narrated *hadîths*, are 95 in total, all of whom were from Medina. Thus, it was because he now brought all the various holders of knowledge who were scattered all around together in one holder (Imâm Mâlik) that he earned the name *Imâm Dâr al-Hijrah*. Of all of his teachers, only six were not from Medina.³¹

He practiced extreme care regarding narrating *hadîths* from just anyone. Imâm Mâlik said, “I do not accept knowledge from four types of people: (1) a person well known to be foolish, even though all the other people narrate from him, (2) a person involved in committing heresy and calling others to innovation in *Dîn*, (3) a person who lies people in daily life, even though I do not accuse him as liar in regards to *hadîth*, (4) and a person who is pious worshipper or scholar but does not properly and correctly memorize what he narrates.”³²

The main sources of Islamic Law, according to Mâlik, are the Qur’an and the *Sunnah*. After that, the *‘Amal Ahl al-Medina*, which was the original term used by Imâm Mâlik ibn Anas, *ijmâ’* and especially *ijmâ’ ahl al-Medina* and *qiyâs*. With respect to secondary sources we could mention *al-maslahah al-mursalah (istislâh)*, customs, *sadd al-zarâ‘i’*, *Istihsân* and *istishâb*. He issued *fatwâ* at the beginning in *Masjid al-Nabawi* but later started to teach and issue *fatwâ* at his home. He became a master at the age of 17; Imâm Shâfi‘î was one of his disciples.³³

Imâm Mâlik had many disciples who taught *hadîths* on his authority, including al-

³⁰ Mâlik ibn Anas, *Al-Muwatta’*, Kitâb al-Talâq, Hadith No: 1245.

³¹ Al-Qattân, *Târikh al-Tashrî‘ al-Islâmî*, pp. 288-91; Auda, *Maqâsid al-Sharî‘ah as Philosophy of Islamic Law*, p. 67.

³² Tashkopruzadeh, *Miftâh al-Sa‘âdah*, vol. II, pp. 195-99.

³³ Mu‘awwadh and Abdulmawjûd, *Târikh al-Tashrî‘ al-Islâmî*, vol. II, pp. 105-22; al-Qattân, *Târikh al-Tashrî‘ al-Islâmî*, pp. 291-94.

Awza'î, al-Thawrî, Sufian ibn 'Uyainah, al-Laith ibn Saki, ibn al-Mubâarak and al-Shâfi'î. Mâlik was well versed in the study of the Qur'an and the *Sunnah*, and served as an official juridical consultant (*mufti*). This last circumstance may explain why Mâlik was the first one to break with the purely casuistic practices of his predecessors and to attempt to formulate the principles underlying the *hadîths* and the customs of Medina, and to arrange them topically.

Imâm Mâlik left behind a large collection of *fatâwâ*. Not only does the *Muwatta'* of Imâm Mâlik not mirror in any sense the uneasy juxtaposition of the reasoning of individual scholars, local consensus and the reported precedents of the Prophet, but it is also the most authentic compilation of *hadîths* and the traditions of the Companions and Followers. The very title *Muwatta'*, which he gave to his book, suggests the nature of the work: the word means that which has been made smooth, even.³⁴

We should mention here Imâm Mâlik's *fiqh* works too. He has not written any book except *Muwatta'*; but his disciples have collected his *fatâwâ* in different collections.

First, (al-Masâ'il) al-Mudawwanah, a recension of Qâdhî Sahnun Abu Sa'id ibn Abd-al-Salam al-Tanukhi (240/854). It consists of questions by Sahnun and answers by Abdurrahman ibn al-Qâsim, one of Mâlik's students for twenty years. As a rule, these answers repeat the literal words of Mâlik, even though at times they are Ibn al-Qâsim's own interpretation of those words. The *Mudawwanah* is a revision by Ibn al-Qâsim of the *Asadiyyah* of Asad ibn al-Furât when it was submitted to Ibn al-Qâsim by Sahnun, who had studied the *Asadiyyah* under Asad. Because Asad failed to incorporate the corrections of Ibn al-Qâsim as found in Sahnun's copy, the *Asadiyyah* fell into oblivion. After Ibn al-Qâsim's death, Sahnun incorporated *hadîths* supporting some of the views into his copy and improved its arrangement. *Mukhtalith* is another name given to the *Mudawwanah*, although in another version it is the name given to the *Asadiyyah* on account of Asad's having studied Hanafite law previously as well. The *Mudawwanah* is the greatest Mâlikite authority. Its relation to other books has been compared to that of the opening chapter (*al-Fâtihah*) of the Qur'an. When the Mâlikites speak of "The Book," this is what they mean.³⁵

Second, al-Wâdihah, by Abu Marwân 'Abd-al-Mâlik ibn Habib al-Sulami (238), of Spain, who studied under Ibn al-Qâsim and spread the Mâlikite teachings in Spain. The *Wâdihah* naturally found favor in Spain.

Third, al-Mustakhrajah min al-Asmi'ah al-Masmû'ah min Mâlik ibn Anas, known

³⁴ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 100-1; Doi, *Sharî'ah: Islamic Law*, pp. 142-57; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 290-91.

³⁵ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 139-40; cf. Melchert, *The Formation of the Sunnî Schools of Law, 9th-10th Centuries*, pp. 156ff.

as al-*ʿUtbiyyah*, by Muhammad ibn Ahmed al- Utbi al-Qurtubi (255/869), a student of ibn Habib. This work superseded the *Wâdihah* and became itself an object of study and comment. The *Mudawwanah*, *Wâdihah* and *ʿUtbiyyah*, with the *Mawâziyyah* of Muhammad ibn al-Mawaz (281/894), a student of Ibn ʿAbd al-Hakam, are called *al-Ummahât*, i. e. the mother books. The last work does not seem to have been distributed as widely as the others.

Mâlik's school naturally found much favor in his native city of Medina and in the western part of the Islamic world, namely, in Morocco, Algeria and Tunis, as well as in the so-called Maghreb (meaning West), which included Spain when that country was under Islamic rule; as well as in the other parts of Africa where Islam had already been accepted and in upper Egypt, where it has many adherents at present.³⁶

4.2.3 The Shâfiʿî School and Its Founder: Imâm Shafiʿî

Imâm Muhammad ibn Idris al-Shâfiʿî (150/767-204/820) was born in Gaza, and died in old Cairo. He was descended from the Hashimi family of the Quraysh tribe to which the Prophet belonged. He taught in Bagdad for a time and later in Egypt.

As a child, he was very intelligent and bright, always keen to learn traditional Islamic sciences. His father died when he was very young and he was brought up by his mother in a very poor home. Thinking his relatives would help her raise him to be a good Muslim, she took him to Mecca. He spent a great deal of his time among the Bedouins while he mastered Arabic and acquired a great knowledge of Arabic poetry.³⁷

He studied Islamic jurisprudence under the well-known scholar Muslim ibn Khalid al-Nanji, the *muftî* of Mecca (796) and Sufian ibn ʿUyainah (796). At the age of twenty he went to Medina and stayed there as one of Imâm Mâlik's students till the latter's death in 796. He spent a total of nine years with Mâlik during which he managed to learn everything Mâlik had to offer. He also came into contact with other learned men from whom he acquired more knowledge of the Qur'an and the *Sunnah*. Imâm ash-Shâfiʿî possessed a very sharp memory and knew all of Imâm Mâlik's *Muwattaʿ* by

³⁶ Akgunduz and Cin, *Türk Hukuk Tarihi*, vol. I, pp. 127-28; Zaidan, *al-Madkhal Li Dirâsah al-Sharīʿah al-Islâmiyyah*, pp. 162-67; Muhammad Abu Zahra, *Imâm Mâlik* (Cairo: Dâr al-Fikr al-Arabî, 1997), pp. 5-20; Tashkopruzadeh, *Miftâh al-Saʿâdah*, vol. II, pp. 195-99; Auda, *Maqâsid al-Sharīʿah as Philosophy of Islamic Law*, p. 67; Muʿawwadh and Abdulmawjûd, *Târikh al-Tashrīʿ al-Islâmî*, vol. II, pp. 139-40; Ibn Khalikân, *Wafayât al-Aʿyân*, vol. IV, pp. 3-5.

³⁷ Muʿawwadh and Abdulmawjûd, *Târikh al-Tashrīʿ al-Islâmî*, vol. II, pp. 141-8; Mawsûʿah al-Adyân al-Muyassarah (Beirut: Dar al-Nafâʿis, 2002), p. 310; Auda, *Maqâsid al-Sharīʿah as Philosophy of Islamic Law*, pp. 68-69; Zuhaylî, *al-Fiqh al-Islâmî*, vol. I, pp. 49-52.

heart.³⁸

But acquiring the knowledge of the scholars in Medina was only the start for al-Shâfi'î because he travelled extensively to most of the places with a reputation for knowledge at the time. In 187/804, he visited Syria and from there proceeded to Egypt where he settled. As a student of Imâm Mâlik, he was received with great honour and respect by the people and scholars of Egypt. And in 810 CE he went to Baghdad where he was surrounded by a large number of students who were eager to acquire knowledge of the faith and practice of Islam from him. One important student there was Imâm Ahmed ibn Hanbal.

Two schools of legal thought or *madhâhib* are actually attributed to al-Shâfi'î, encompassing his writings and legal opinions (*fatâwâ*). Jurists refer to these two schools as "The Old" (*al-qadîm*) and "The New" (*al-jadîd*), corresponding respectively to his stays in Iraq and Egypt. The most prominent transmitters of the New among al-Shâfi'î's students were al-Buwayti, al-Muzani, al-Rabi', al-Muradi and al-Bulqini, in *Kitâb al-Umm* ("The Mother Book"). The most prominent transmitters of the Old were Ahmad ibn Hanbal, al-Karabisi, al-Za'farani, and Abu Thawr, in *Kitâb al-Hujja* ("Book of the Proof"). What is presently known as the Shâfi'î position refers to the New except with respect to approximately twenty-two questions in which Shâfi'î scholars and muftîs have retained the positions of the Old.³⁹

The Muslim Scholars consider al-Shâfi'î to be the vindicator *par excellence* of the *hadîths*, although to the impartial critic this view does not seem very well founded if it is taken to mean that he did not use *ra'y* at all. In fact, the difference between Abu Hanîfa and al-Shâfi'î was more a matter of appearance than reality. Al-Shâfi'î freely admitted the lawfulness of the use of *qiyâs*, and his method of determining the "effective" cause for purposes of *qiyâs* was looser than Abu Hanîfa's. It is true that al-Shâfi'î objected to the principle of *Istihsân* introduced by Abu Hanîfa, but he himself introduced the principle of *istishâb*, which, supplemented by the greater liberty of action afforded by his looser method in *qiyâs*, was as effective a means of introducing personal opinion as Abu Hanîfa's *Istihsân*. But this is true only as a theoretical statement because it may be fairly said that in practice al-Shâfi'î preserved the spirit of the *hadîths* more faithfully and used them more extensively. It is easy to understand why it should be so, if we remember that al-Shâfi'î studied *fiqh* in Mecca and in Medina under Mâlik, the champion of the *hadîth* folk. Imâm Shâfi'î's in-depth studies with Imâm Mâlik made him an expert on the Mâlikî school of law, but in Baghdad, he had a new opportunity to explore the Hanafî school of law deeply. He lived with Hanafî jur-

³⁸ Ibn Khallikân, *Wafayât al-A'yân*, vol. IV, pp. 21-5; Al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 296-99; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 199-201.

³⁹ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp.148.

ists and discussed various legal issues with them, defending the position of his master Imâm Mâlik and he gained a reputation as an upholder of *hadîths*.⁴⁰

The following quotation from the *Risâlah* will illustrate well his tendency "God has not given it to any one after the death of the Prophet to express opinions except on the authority of the knowledge (*ilm*) that came before him, and such knowledge consists in the Book, the *Sunnah*, the *ijmâ'*, and the sayings and doings (*âthâr*) of the Companions, and then, as I have explained, in *qiyâs* on the basis of the preceding, and no one is allowed to use *qiyâs* until he has learned what has occurred before him in the way of practices (*sunan*) and sayings of the predecessors, and the *ijmâ'*s and differences among the people, as well as the Arabic language."⁴¹

Al-Shâfi'î was very brilliant, and he was unrivalled in his abundant merits and illustrious qualities. To his knowledge of all the sciences connected with the book of God, the *Sunnah*, the sayings of the Companions, their history, the conflicting opinions of the learned, etc., he added a deep acquaintance with the language of the Arabs of the Desert, philology, grammar and poetry.

Ahmad Ibn Hanbal, one of al-Shâfi'î's disciples, is quoted as saying, "al-Shâfi'î was to mankind, what the sun is to the world, and health to the body; what can replace them?"

In contrast to Abu Hanîfa, who liked hypothetical speculation, al-Shâfi'î was rather averse to and probably not very skillful in subtle distinctions. He therefore relied on the revealed sources whenever he could find the desired provisions in them. The following verses composed by al-Shâfi'î bear this out: "*The more experience instructs me, the more I see the weakness of my reason; and the more I increase my knowledge, the more I learn the extent of my ignorance.*"

In short, al-Shâfi'î was an eclectic, who arrived on the scene when the law books had already been arranged into elaborate systems, and the laws sifted and laid down in a hard and established way. He studied the schools of the forerunners and learned from the most prominent jurists; he disputed with the ablest and profoundest and examined their teachings, and later on, on that basis, developed a method that combined the Book, the *Sunnah*, the *ijmâ'* and the *qiyâs*. Thus, he did not confine himself to any one of these sources, as others did.

The avowed object of al-Shâfi'î was to reconcile *fiqh* and tradition, and to those concerned he seemed to have succeeded (*jamâ'a bayn al-fiqh wa'l-sunnah*). This ex-

⁴⁰ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 148-51; Doi, *Sharî'ah: Islamic Law*, pp. 157-60.

⁴¹ Muhammad ibn Idris al-Shâfi'î, *al-Risâlah*, ed. Ahmed Muhammad Shakir (Beirut: al-Maktabah al-Ilmiyyah, d.n.), pp. 39-42, 596-600; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 199-208; Aghnides, *Islamic Theories of Finance*, pp. 142-45; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 299-304.

plains why there was a rapid conversion to his school when al-Shâfi'î appeared in Bagdad. Among the most prominent disciples and followers of al-Shâfi'î were Ahmad ibn Hanbal, Rabi' ibn Sulayman al-Muradi (880), Abu Ya'qub al-Buwaiti (845), Abu Ibrahim ibn Yahya al-Muzani (877), Abu al-Thawr, al-Za'farâni, al-Tabarî and others.

According to the *Tahdhîb* al-Shâfi'î wrote 113 works on interpretation (*tafsîr*), *fiqh*, literature, etc. The works relating to *fiqh* are, the *Risâlah*, the *Kitâb al-Umm*, the two *Jâmi's* and *Mukhtasars* al-Muzani, the *Mukhtasar* of Rabi', etc. The most renowned commentaries on al-Shâfi'î's writings are the *Ta'liqs* of Abu Hâmid al-Isfarâyini, al-Tabarî and al-Mâwardî.⁴²

Baghdad and Cairo were the chief centers of Imâm ash-Shâfi'î's activities. It is from these two cities that the teachings of the Shâfi'î school spread in the 9th century CE. During the time of Sultan Salahuddin, the Shâfi'î *Madhhab* (or school of Jurisprudence) was the most prominent in Egypt, and to this day the Imâm of al-Azhar Masjid is always a Shâfi'î, and the al-Shâfi'î *Madhhab* is industriously studied along with that of the other three schools of the Sunnîs.⁴³

Imâm al-Shâfi'î was a man of strong and vigorous mind, with more worldly experience than Imâm Abu Hanîfa and Imâm Mâlik. From the materials furnished by Imâm Ja'far al-Sâdiq, Imâm Mâlik and Imâm Abu Hanîfa, he formed an eclectic school that found acceptance chiefly among the middle classes. Al-Shâfi'î *Madhhab* has adherents in North Africa, parts of Egypt, southern Arabia and the Malayan Peninsula, and among the Muslims of Ceylon and the Mumbai State in India.⁴⁴

At present, the followers of this school are found in the Strait settlements, the Malayan districts of Thailand, the Hindustani coast (Malabar and Coromandel), in southern Arabia, especially in Hadramut, in Bahrain, in the Persian Gulf states, in certain Central Asian districts, in Dagistan and in the former German East African colonies. Finally, some Muslims in Syria follow the Shâfi'îte teachings only in the private domain. This is also true of those found in Arabia and Egypt.⁴⁵

⁴² Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 305-08; Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*, pp. 68-69; cf. Melchert, *The Formation of the Sunnî Schools of Law, 9th-10th Centuries*, pp. 68ff.

⁴³ Doi, *Sharî'ah: Islamic Law*, pp. 160-62.

⁴⁴ Al-Dhahabî, *Siyar A'lâm al-Nubalâ*, vol. X, pp. 5-99.

⁴⁵ Al-Shâfi'î, *introduction to al-Umm*, vol. I-VIII, (Cairo: Dar al-Ma'rifah, 1973),; Akgunduz, *Türk Hukuk Tarihi*, vol. I, pp. 128-29; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 167-70; Muhammad Abu Zahra, *Imâm Shâfi'î* (Cairo: Dâr al-Fikr al-Arabî, 1997), pp. 4-20; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 199-208; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, p. 313.

4.2.4 *The Hanbalî School and Its Founder: Imâm Ahmad ibn Hanbal*

Imâm Ahmed ibn Muhammad ibn Hanbal (780-855/164-241) was an important Muslim scholar and theologian born in Khorassan into a family of Arab origin. He is considered to be the founder of the Hanbalî school of *fiqh* (Islamic jurisprudence). He began his early study of *hadîth* literature (795) when he was only sixteen years old. Ibn Hanbal started his career by learning jurisprudence (*fiqh*) under the celebrated Hanafî judge Abu Yusuf, the renowned student and companion of Abu Hanîfa. He then discontinued his studies with Abu Yusuf to pursue *hadîths*, travelling around the caliphate at the age of sixteen. It is said that, as a student, he impressed his teachers greatly. Ibn al-Jawzi states that ibn Hanbal had 414 *hadîth* masters from whom he narrated. These included Imâm Shâfi'î, Bishr ibn al-Mufaddal, Isma'il ibn 'Ulayyah, Yahya ibn Sa'id ibn al-Qattan, 'Abdullah ibn Namir and Sufian ibn 'Uyainah. Imâm al-Shâfi'î was one of ibn Hanbal's teachers with whom he shared mutual respect.⁴⁶

Ahmad was a disciple of al-Shâfi'î and, next to Dâwud al-Zâhirî; he was the staunchest opponent of the *ra'y*-folk. He makes very little use of *qiyâs* and bases his system mainly on the sacred texts. He is uncritical in the selection of his *hadîths*, of which he compiled about 28,000 in his *Musnad*. He was a very conservative theologian, which led him into difficulties.⁴⁷

He was the true Shaikh of Islam and leader of the Muslims in his time, the *hadîth* master. He took *hadîth* from Hushaym, Ibrahim ibn Sa'd, Sufian ibn 'Uyaina, 'Abbad ibn 'Abbad, Yahya ibn Abu Zaid. Al-Bukhârî narrated two *hadîths* in the *Sahîh* from him, Muslim 22, Abu Dawud 254, Abu Zur'a, Mutayyan, 'Abdullah ibn Ahmad, Abu al-Qasim al-Baghawi and a huge array of scholars also narrated *hadîths* from him.⁴⁸

Imâm Ahmad ibn Hanbal came to be seen as a threat to the caliph and his religious authority. As a result, he was imprisoned for a long time and was treated harshly by a number of rulers. Caliph al-Ma'mun subjected scholars to severe persecution at the behest of the Mu'tazilî theologians, most notably Bishr al-Marrisi and Ahmad ibn Abu Dawud, mainly to establish the notion that God created the Qur'an as a physical entity (rather than stating that Qur'an is God's speaking in an indescribable way, as held by the *ahl al-sunnah* view).

Almost all of the scholars in Baghdad acknowledged the doctrine of the creation of the Qur'an, with the notable exceptions of Ibn Hanbal and Muhammad ibn Nuh.

⁴⁶ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 159-67; ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. I, p. 23; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 314-17; Zuhaylî, *al-Fiqh al-Islâmî*, vol. I, pp. 52-55.

⁴⁷ Al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 317-18.

⁴⁸ Aghnides, *Islamic Theories of Finance*, p. 145-46; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 208-10.

This greatly pained and angered Ibn Hanbal, so he boycotted some of the great traditionists because of their acknowledgement and often refused to narrate *hadīths* from them. Among those boycotted were a close companion and a colleague of Ibn Hanbal, Yahya ibn Maʿin, about whom it is said that Ibn Hanbal refused to speak to him until he died.⁴⁹

Finally, Ahmad ibn Hanbal and Muhammad ibn Nuh were also put to the test by the order of al-Maʿmun, but they refused to acknowledge the literal creation of the Qurʾan like Allah's other creatures. Consequently, they were dispatched in irons to be dealt with by al-Maʿmun himself. On the way Imām Ahmad prayed to Allah to prevent him from meeting al-Maʿmun. His prayer was answered when al-Maʿmun suddenly died, as a result of which they were both sent back home. Muhammad ibn Nuh died on their return journey, and there was no one to prepare his funeral, pray over and bury him except Imām Ahmad.⁵⁰

The policy endorsing the premise of the created Qurʾan was continued by al-Muʿtasim (who is reported to have had Ibn Hanbal flogged) and by al-Wāthiq (who banished Ibn Hanbal from Baghdad).

Despite being noted as exceptional jurist, Imām Ahmad deplored his opinions being written and compiled, fearing that this would lead his students away from studying the sources of Law themselves, the Qurʾan and the *Sunnah*.

Imām Ahmad sought to employ exceptional caution when formulating juristic opinions and issuing verdicts, and would frequently warn his students against speaking on matters in which they had no reputable predecessor. This prudent approach is demonstrated in the thought process applied by Ahmad in extrapolating laws from the divine sources, which is as follows:

1) The divine text (the Qurʾan and the *Sunnah*) was the first point of reference for all scholars of jurisprudence, and here Ahmad was no exception. Whenever he noticed divine textual evidence for an issue, he never referred to other sources, opinions of the Companions, scholars or resorted to analogical deduction (*qiyās*).

2) Verdicts issued by the Companions were consulted when no textual evidence was found in the Qurʾan or the *Sunnah*. The reasons for ranking the verdicts of the Companions below the Qurʾan and the *Sunnah* are obvious: the Companions witnessed the revelation of the Qurʾan, and its implementation by Muhammad, who advised the *Ummah* to adhere to the rightly guided caliphs. Hence, the Companions ought to have a better understanding than the later generations.

Imām Ahmad would likewise never give precedence to a scholarly opinion or ana-

⁴⁹ al-Qattān, *Tārīkh al-Tashrīʿ al-Islāmī*, pp. 318-19.

⁵⁰ Doi, *Shariʿah: Islamic Law*, pp. 162-66.

logical deduction (*qiyâs*) over that of the Companions. If they were divided into two camps over an issue, Imâm Ahmad would similarly document two different narrations.

3) In cases where the Companions differed, he preferred the opinion supported by the divine texts (the Qur'an and the *Sunnah*).

4) In instances where none of the above was applicable, Ahmad would resort to the *mursal hadîth* (where a link was missing between the Successor and Muhammad or a weak *hadîth*). However, the type of weak *hadîth* that Ahmad relied on was such that it may be regarded as a fair *hadîth* due to other evidences (*Hasan li Ghairihi*), not the type that was deemed very weak and thus unsuitable as an evidence for Law. This was due to the fact that, during his time, the *hadîths* had been categorised only as "sound" (*Sahîh*) and "weak" (*dha'îf*). It was only after Ahmad, that al-Tirmidhi introduced a third category of "fair" (*hasan*).

5) Only after having exhausted the aforementioned sources would Imâm Ahmad employ analogical deduction (*qiyâs*) out of necessity, and then with the utmost care.⁵¹

We could say that the school of Imâm Ahmad was codified by his students. He has some books but none directly on law. Two works can be mentioned: *Kitâb al-'Ilal wa Ma'rifah al-Rijâl* (Hidden Flaws in Hadîth) and *al-Musnad*. *Al-Musnad* is among the largest codifications of *hadîths*. His disciples collected his *fatâwâs*: *al-Mudawwana*; Abu Bakr al-Hallâl's (311/923) *al-Jâmi'* and 'Umar al-Khiraqi's (324/935) *Mukhtasar* are the best examples. Detailed information on these works can be found in the chapter on references.⁵²

But the Hanbalî school became more famous in the history of Islam and today because of the works of two important Hanbalî scholars.

First, Ibn Taimiyya (728) was a legendary figure in Islamic history, known by his friends and opponents for his expertise in all Islamic sciences. Aside from being a celebrated scholar, he also gained a great deal of prominence due to his fearlessness, zealous activism, political and military campaigns in Damascus against the invading Tatar. In his book *al-Radd al-Wâfir* ibn Nasir al-Dîn al-Dimashqi mentions 87 scholars from all schools who referred to Ibn Taimiyya as "sheikh al-Islam," a prestigious title given only to jurists and traditionalists whose verdicts reached a high level of fame and acceptance. His fame also earned him many jealous enemies who continued to conspire against him, until he was imprisoned in the citadel of Damascus and died

⁵¹ Al-Dhahabî, *Siyar A'lâm al-Nubalâ*, vol. XI, pp. 177-358; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 167-8; ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. I, pp. 23-28; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 320-26.

⁵² Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 192-95; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 319-20; Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*, p. 67.

there. His funeral was attended by a large number of inhabitants from Damascus, while the funeral prayer in absentia was prayed over him throughout the Islamic world. He is remembered for his invaluable contributions not only to the Hanbalî school of jurisprudence and theology but also to the rich Islamic heritage. He also produced many students of high caliber. Names such as ibn al-Qayyim and ibn Kathir are only some of his virtues. *Fatâwâ Ibn Taimiyya* and *al-Siyâsah al-Shar'îyyah* are among his most well-known works.⁵³

Second, Ibn al-Qayyim al-Jawziyya (751) was Ibn Taimiyya's student and closest companion, sharing times of ease and hardship with him until the latter's death in the citadel. His works in various Islamic sciences earned him much acceptance and fame. Some of his important works include *Zâd al-Ma'âd* in *Sîrah* and *Fiqh*, *I'âm al-Muwaqqi'în* in *Usûl al-Fiqh* and *al-Kâfiyah fil-Intisâr lil-Firqah al-Nâjiyah*, on Hanbalî theology, which is still taught and studied in Hanbalî schools.

His followers are now found in central Arabia, the inland districts of Oman, and in the Persian Gulf states. The others are few in number and are scattered in out-of-the-way localities, in a number of Central Asian cities and in the rural populations of some isolated Syrian villages. The Hanbali school is the official school of Saudi Arabia.⁵⁴

4.2.5 The Zâhirî School and Its Founder: Imâm Dawud ibn 'Ali al-Zâhirî

The founder of this school was Dawud ibn 'Ali al-Khalaf (270/883), better known as Dawud al-Zâhirî, who threw *qiyâs* overboard and adhered to the letter (*al-zâhir*) of the Qur'an and the *hadîths* and insisted on sticking to the manifest (*al-zâhir*) or literal meaning of expressions in the Qur'an and the *Sunnah*. The school and its followers are called *Zâhiriyyah*.⁵⁵

Among the textual evidence for their claim, the Zâhirîsts use verses similar to "... *this is clear Arabic language*"⁵⁶ to back their view. In their view, anyone possessing

⁵³ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 177-88; cf. Melchert, *The Formation of the Sunnî Schools of Law, 9th-10th Centuries*, pp. 137ff.

⁵⁴ Akgunduz, *Türk Hukuk Tarihi*, vol. I, pp. 129-30; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 170-73; Muhammad Abu Zahra, *Imâm Ahmad ibn Hanbal* (Cairo: Dâr al-Fikr al-Arabî, 1997), pp. 6-20; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 208-10; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 327-28; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 188-92.

⁵⁵ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. II, pp. 196-97; Zuhaylî, *al-Fiqh al-Islâmî*, vol. I, pp. 55-6.

⁵⁶ The Qur'an, 16:103.

knowledge of the Arabic language is able to understand the message of God to the extent that he can fulfill his religious duties.

The family of Dawud ibn 'Ali came from Kashan, a town in the neighborhood of Isfahan. His father was a secretary (*Kâtib*) to 'Abdullah ibn Khâlid, the judge of Isfahan, in the time of Caliph al-Ma'mun. Dawud himself was born in Kufa in 202/817. His family moved to Baghdad later where he was brought up, educated, and later laid the foundation of his school of jurisprudence that bore his name *al-Madhab al-Dawudî* but was better known as the Zâhirîte school (*al-Madhab al-Zâhirî*).⁵⁷

In Baghdad Dawud ibn 'Ali attended the lectures of many eminent jurists, the most prominent of whom was Abu Thawr (246/860); a friend and follower of Shâfi'î. The education he received from them made him shift from the Hanafîte rite to that to which his father belonged, the Shâfi'îte, apparently because most of his professors (*shuyûkh*) were more inclined to the Traditionist (*ahl al-hadîth*) school to which Shâfi'î belonged than to the school of the upholders of opinion (*ashâb al-ra'y*) who were the followers *par excellence* of ibn Hanîfa. Dawud completed his education by an academic trip to Nishapur to meet Ishaq ibn Rahawaih (237/851 or 238/852).

Dawud ibn 'Ali was accomplished, trustworthy, learned, God-fearing, pious and ascetic. He was also well-versed in logic and proficient in the art of disputation. It was said that he believed that the Qur'an was created and not eternal, but it seems that this was only an accusation. He died in 270/884 in Baghdad.

Dawud ibn 'Ali was a prolific writer. Ibn al-Nadim lists about 150 titles by him, a few of which touched on the fundamentals of religion: "On the *Usûl*," "On the Caliphate," "Consensus and the Refutation of *Qiyâs*," and "On the Refutation of *Taqlîd*." Most of his other books discussed branches (*Furû'*) or minor aspects of *fiqh* concerning worship and legal transactions. Unfortunately, no book by him has survived.⁵⁸

It was related that Dawud ibn 'Ali permitted analogy (*qiyâs*) when the cases in question were obvious, but it is more probable that he rejected analogy completely, regardless of whether the cases were ambiguous or obvious. As for consensus (*ijmâ'*), his position was totally different: he admitted the *ijmâ'* of the Companions of the Prophet only on the basis that these Companions were in constant contact with the Prophet and fully aware of his intentions.

Dawud ibn 'Ali reexamined all aspects of *fiqh* on the basis of his Zâhirîte attitude. The jurists who were contemporary with Dawud ibn 'Ali took a very critical attitude regarding him and his school. The Shâfi'îtes in general criticized him severely and con-

⁵⁷ The Committee, *Mawsû'ah al-Adyân al-Muyassarâh*, p. 240; Aghnides, *Islamic Theories of Finance*, p. 146.

⁵⁸ Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 198-203.

sidered the Zâhirîte School to be worthless. Al-Isfarayini (418/1027) maintained that no account should be taken of the Zâhirîtes. Since they rejected analogy (*qiyâs*), he asserted, they were not able to exercise judgment and, therefore, no one among them should be elevated to the position of a judge. Others thought that Dawud ibn 'Ali was ignorant and still others considered him to be a disbeliever. Ahmad ibn Hanbal (241/855), the famous founder of the Hanbalîte School, did not esteem him in any way.⁵⁹

Dawud ibn 'Ali was succeeded as the head of the Zâhirîte School by his son, Abu Bakr Muhammad ibn Dawud (255/869-297/910). But the latter was more of a poet, litterateur, and historian than an enthusiastic scholar of jurisprudence. The Zâhirîte School enjoyed its widest expansion and the height of its prestige in the fourth/tenth century. Tabarî (310/923), though not a Zâhirîte, paid close attention to Zâhirî jurisprudence and studied it with Dawud ibn 'Ali himself. The foremost jurist of the Zâhirîte School in the fourth/tenth century was 'Abdullah ibn Ahmad ibn al-Mughallis (324/936) through whom the *fiqh* of Dawud ibn 'Ali became popular in the Muslim world.

In the following century the Zâhirîte School was already losing ground in the East and before the middle of the century, in the days of the Hanbalîte judge Abu Ya'la (459/1066), the Hanbalîte rite took its place. The Zâhirîte School continued to enjoy some prestige in Syria until 788/1386. The school survived longer in Egypt and had deeper roots. Al-Maqrizi (845/ 1442), the famous historian of the Mamluk period in Egypt, was not a follower of the Zâhirîte school, but he was favorable toward Zâhirîsm.

Ibn Hazm, a well-known practitioner and teacher of this school, would refer to himself and those who followed this view as *ashâb al-Zâhir*, or "the people of the literal sense," as a definition rather than a label. Although he was originally a Shâfi'î jurist, Ibn Hazm joined the Zâhirî school and brought to it a systematic, logical structure. For interpreting sacred texts, he compiled a Zâhirî grammar in which he specifically eliminates the ambiguities that grammarians used to explain certain syntactical forms. He takes the position that language itself provides all that is necessary for understanding the content of the Qur'an and that, therefore, God, who revealed the Qur'an in clear (*mubîn*) Arabic, used the language to say precisely what he means. Each verse should be understood grammatically and lexically in its immediate and general sense: if God wants a verse to have a specific meaning, he provides an indication (*dalîl*), in the same verse or elsewhere, which allows a restriction of the mean-

⁵⁹ M.M Sharîf, *A History of Muslim Philosophy* (Hamburg: Pakistan Philosophical Congress, 1963), vol. I, pp. 274-88.

ing.⁶⁰

He has two important books on Islamic Law: *al-Muhallâ (fiqh)* and *al-Ihkâm (usûl al-fiqh)*. In *al-Ihkâm fi Usûl al-Ahkâm* (Judgment on the Principles of Ahkâm), Ibn Hazm develops his method for classifying human acts within the five established juridical categories (*ahkâm*) of obligatory, recommended, disapproved, forbidden and lawful: for an action to fall into one of the first four categories, there must be a text (Qur'an or authentic *hadîth*) that establishes its particular status; otherwise, the act is lawful. This method is applied further in his voluminous treatise on Zâhirî law, *Kitâb al-Muhallâ* (The Book of Ornaments). Ibn Hazm is also famous for his great work, the *Fisal* (Detailed Critical Examination), in which he offers a critical survey of different systems of philosophical thought in relation to religious beliefs among the skeptics, Peripatetics, Brahmins, Zoroastrians and other dualists, Jews and Christians. Using the examination of these religions to establish the preeminence of Islam, he also attacks all the Muslim theologians, the Mu'tazila and the Ash'ariyah in particular, along with philosophers and mystics.⁶¹

For a certain period Zâhirîsm constituted a school of jurisprudence in the East, but in Muslim Spain it never developed beyond a persecuted philosophy. Even as a philosophy it began to decline there after the death of Ibn Hazm. It is true that Ibn Hazm built a Zâhirîte system of dogma and revised Muslim law from that standpoint, but his views enjoyed only a limited acceptance in the Muslim West.

At one time the Zâhirî school spread as far west as Spain when that country was under Muslim rule, but it boasts no adherents at present.⁶²

4.2.6 The Ja'farî School and Its Founder: Imâm Ja'far al-Sâdiq

This is the school founded by Ja'far al-Sâdiq who was born and died in Medina (702-765). Ja'far ibn Muhammad ibn 'Ali ibn Husayn is believed by the Twelver and Ismailî Shî'a Muslims to be the sixth infallible Imâm or spiritual leader and successor to the Prophet Muhammad. He is the last Imâm recognized by both the Ismailî and Twelver Shî'a schools, and the dispute over who was to succeed him led to a division within Shî'a Islam.⁶³

⁶⁰ Abdurrahman ibn Khaldun, *Târîkh ibn Khaldun*, vol. I, pp. 478.

⁶¹ Cf. Melchert, *The Formation of the Sunnî Schools of Law, 9th-10th Centuries*, pp. 178ff.

⁶² Muhammad Abu Zahra, *Ibn al-Hazm* (Cairo: Dâr al-Fikr al-Arabî, 1997), pp. 3-20; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 179-80; Ali Ibn al-Hazm, introduction to *al-Muhalla*, v. I-XII (Cairo: 1960); Hallaq, *The Origins and Evolution of Islamic Law*, p. 124; Melchert, *The Formation of the Sunnî Schools of Law*, pp. 177-78.

⁶³ Al-Dhahabî, *Siyar A'lâm al-Nubalâ*, vol. X, pp. 104-05; Zuhaylî, *al-Fiqh al-Islamî*, vol. I, pp. 58-9.

Al-Sâdiq is said to be highly respected by both Shī'a and Sunnī Muslims for his great Islamic scholarship, pious character, and academic contributions. Although he is perhaps most famous as the founder of the *Ja'farī fiqh*, known as Ja'farī jurisprudence, he had many other accomplishments as well. In addition to being an Imām in the Shī'a chain, he was also part of the Naqshbandī Sufi chain. He was a polymath: an astronomer, alchemist, Imām, Islamic scholar, theologian, writer, philosopher, physician, physicist and scientist. He was also the teacher of the famous chemist, Jâbir ibn Hayyan, and of Abu Hanîfa, the founder of the Hanafī madhhab.

The Ja'farī school, Ja'farī jurisprudence or Ja'farī fiqh is the school of jurisprudence derived from the name of Ja'far as-Sâdiq, the sixth Shī'a Imām. It differs from the four schools or *madhhabs* in its reliance on *Ijtihād*, the use of reason to interpret Islamic laws, as well as on matters of inheritance, religious taxes, commerce, personal status and the allowing of temporary marriage or *mut'ah*. However, despite these differences, there have been numerous *fatwās* regarding the acceptance of the Ja'farī fiqh as an acceptable *madhhab* by Sunnī religious bodies. These include the Amman Message and a *fatwā* by al-Azhar. There are many scholars among his disciples, such as Abban ibn Thaghlab al-Bakri, Jâbir ibn Yazid al-Ja'fi and Dawud ibn Farqad al-Asadi. Both Abu Hanîfa and Imām Mâlik were among those, said to number four thousand, who benefited from his teachings.

The main sources of law for the Ja'farī school are the Qur'an, the *Sunnah*, *ijmâ'* and *'aql*. But the term *Sunnah* covers all the deeds and sayings of the Prophet and the infallible Imāms. The *fiqh* of Jafarī is somewhat different from that of other schools in that it does not employ *qiyās* but uses the intellect, *'aql*. Another difference is, of course, that it does not use the same *hadīths*. Many Sunnī *hadīths* are excluded because they are attributed to enemies of Shī'ism, as is the case with Aisha's *hadīths*. Also, they have a rich collection of their own unique *hadīths*, related to the Imāms who, according to Shī'ī definition, could not commit sin or err. Here the Ja'farī school of law and Shī'a as a theological school have become intermingled.

Ja'farī *fiqh* regarded consensus as valid only if the opinion of the Imām was included. The line of development in Shī'ī jurisprudence was more direct because of the belief that the Imāms were infallible. The Imāms simply reflected and therefore reproduced the original prophetic teaching in different circumstances over a period of time. As a result of this advantage, they did not need to resort to analogy (which, indeed, later became unacceptable in Shī'ī theology) nor was much importance attached to consensus. They considered 'Ali and the Ahl al-Bayt (the household of the Prophet) to be the best interpreters of the Qur'an and prophetic teachings. Thus, the Shī'ī School is based entirely on traditions and teachings of the twelve Imāms, each of whom was appointed by his predecessor, starting with 'Ali ibn Abu Tâlib and therefore the Prophet himself. The last Imām entered occultation, and his return is awaited

as the savior.

The Ja'farî school uses *Ijtihâd* by adopting reasoned argumentation in finding the laws of Islam. *Usûlîs* emphasize the role of *Mujtahid* who was capable of interpreting the sacred sources independently as an intermediary of the Hidden Imâms and, thus, serves as a guide for the community. This meant that legal interpretations were kept flexible so as to take account of changing conditions and the dynamics of the times. This school of law is predominant among most Shî'a.

Usûlîs are the majority Twelver Shî'a Muslim group. They differ from their now much smaller rival *Akhbârî* group in favoring the use of *Ijtihâd*, i.e. reasoning in the creation of new rules of *fiqh*, in assessing *hadîths* to exclude traditions they believe to be unreliable, in considering it obligatory to obey a *mujtahid* when seeking to determine islamically correct behavior.

The *Akhbârîs* (Traditionalists) are Twelver Shî'a Muslims who reject the use of *Ijtihâd* or reasoning in the creation of new laws and believe only the Qur'an and *ahadîths* (prophetic sayings and recorded opinions of the Imâms) should be used as sources for law. They form a minority within Shî'a Islam, with *Usûlîs* making up the majority. Unlike *Usûlîs*, *Akhbârîs* do not follow *marja's* who practice *Ijtihâd*.

The *Akhbârî* movement was dominant in Twelver Shî'i Islam from the middle of the Safavid dynasty up until the time of Muhammad Baqir Behbahani (1792) who, along with other *Usûlî mujtahids*, crushed the *Akhbârî* movement. It is found today primarily in the island nation of Bahrain, with reportedly "only a handful of Shî'i 'ulamâ" still *Akhbârî* at the present time.⁶⁴

The views of the Ja'farî school have been transmitted by disciples like Abu Ja'far ibn al-Hasan al-Qummi (290/902) who was the real founder of this school in Iran. Among his works we could mention *Bashâ'ir al-Darajât fî Ulûm Âl-i Muhammad wamâ Khassahum bihi*. The most famous books of the Ja'farî school are *Sharâyi' al-Islam* by Ja'far ibn Hasan al-Muhaqqiq al-Hilli (676/1277), the commentary on this book, i.e. *Jawâhir al-Kalâm* by Muhammad Hasan al-Najafi, *Tadhkirah al-Fuqahâ* by Muhsin ibn Yusuf al-Hilli, and *Miftâh al-Karâmah Sharh Qawâ'id al-Allâmah* by Muhammad ibn Hasan al-Amili (1226).

At one time the Ja'farî school was present in Iran, Iraq, India, Pakistan, Lebanon and Syria. But there are some Ja'farîs in Turkey and in other countries.⁶⁵

⁶⁴ Cf. Robert Gleave, "Akbârî Shî'i Usûl al-Fiqh and the Juristic Theory of Yusuf ibn Ahmad al-Bahrânî," Robert Gleave and Eugenia Kermeli, *Islamic Law: Theory and Practice*, (Nw York: I.B.Tauris, 2001), pp. 24ff.

⁶⁵ Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 175-78; Muhammad al-Husayin al-Muzaffar (1301-1375), *al-Imâm al-Sâdiq*, 2nd Ed. (Beirut: Dâr al-Zahrâ' li-al-Ṭibâ'a Wa al-Nasr Wa

4.2.7 *The Zaidiyyah School and Its Founder: Imâm Zaid ibn 'Ali*

This is the school founded by Zaid ibn 'Ali (695-740). He was given the title "Zaid the Martyr" (Zaid al-Shahîd) by his sympathizers. He was the grandson of Husayn ibn 'Ali, the grandson of Muhammad. Zaid was born in Medina in 695, from a father who was the Shî'a Imâm 'Ali ibn Husayn, "Zayn al-'Abidîn". Zaid's mother was a former slave from Sind called Jaydâ, who is said to have been presented to his father by the Shî'i rebel leader *al-Mukhtâr*.⁶⁶ His father Ali, the son of al-Hussein ibn 'Ali ibn Abu Tâlib the fourth Khalîfah, was one of the few descendants of Hussein who were spared at Karbalâ. Imâm Zaid's father was highly respected and highly educated and rejected the extremism of those who claimed to be Shî'a. We would say that Imâm Zaid was from *imams* of *âl al-bait* (descendants of Muhammad). He has refused the extremist Shî'a views; told them "*You should go away, you are Rafidhîs*". He was respecting Abu Bakr and 'Umar as Caliph and important companions of the Prophet. His followers are the modest Shî'a; they are reasonable Muslims and could accept the rights easily. In the future they could make their neighbors *Wahhabîs* more moderate and may join to *ahl al-sunnah*.⁶⁷

It was in this environment that Imâm Zaid was born. His father died when he was fourteen, and his elder brother Muhammad al-Bâqir took care of him. His early education was done by this same brother, who was considered at that time to be a great scholar. He also studied with another great scholar, 'Abdullah ibn Hasan ibn 'Ali. Both al-Bâqir and 'Abdullah ibn Hasan taught many great scholars and *Imâms* like Abu Hanîfa and Imâm Mâlik, who took *hadîths* from them. Imâm Zaid also studied under other *Tâbi'in* who resided in Medina.

Later on Imâm Zaid moved to Basra where he met Wâsil ibn 'Atâ, the founder of the Mu'tazilas. He kept moving between Iraq and Hijaz, seeking knowledge. Abu Hanîfa once said concerning Imâm Zaid, "I met Zaid and I never saw in his generation a person more knowledgeable, as quick a thinker, or more eloquent than him. He was in a class by himself."

Imâm Zaid had differences with Khalîfah Abdul Malik, and even rebelled against him. He went to Kufa where he was joined by Shî'a of Iraq. 15,000 people gave him the *Bay'ah* (*obeying contract*) in a *Masjid*, but only about 400 of them stood with him when he faced the army of the Khalîfah. Imâm Zaid felt that a military confrontation

al-Tawzî') vol. I, pp. 60, 151, 205-09; v. II, pp. 144-91; Moojan Momen, *An Introduction to Shi'î Islam: The History and Doctrines of Twelver Shi'ism* (Oxford: G. Ronald, 1985), p. 127-222.

⁶⁶ Zuhaylî, *al-Fiqh al-Islamî*, vol. I, pp. 56-58.

⁶⁷ Bediuzzaman Said Nursi, *Barla Lahikası*, (Istanbul: Sozler, 1990), p. 182.

was the best way to deal with Khalīfah, and felt let down after he was abandoned by his so-called supporters in the same way that his grandfather Hussein had been abandoned by his supporters.

Even though both Imâm Hussein and Imâm Zaid employed a military solution to correct the situation in the Islamic state at that time, what was needed was a group that would work in the *Ummah* to educate it and serve as a safeguard for the *Ummah*, instead of rebelling against the Khalīfah without this preparation, which did not at all solve the problem but rather made matters more complicated.⁶⁸

The stand by Imâm Zaid and his few supporters against the army of the Khalīfah ended with his death. He was heard to say: "I am worried that I will be disappointed just like my grandfather al-Hussein was disappointed." And, in fact, this proved to be true. Although he viewed 'Ali as deserving the Khalīfah, he also recognized the Khalīfah of Abu Bakr, 'Umar and 'Uthman. He also believed that the Khalīfah did not have to be predetermined by the texts but that it was enough to be from Banu Hâshim, and that the Khalīfah was not infallible. He did not document his *Madhhab* that was done later

Several works of *hadîths*, theology and Qur'anic exegesis are attributed to him. The Mu'tazilî school of theology is believed to have adopted many of Zaid's teachings, and therefore followers of the Zaidî school are close to Mu'tazilîte school of theology.

The Zaidî school is close to four large schools of *fiqh*. There are some differences between them, for example, Zaidîs do not allow marriage with an *ahl al-Kitâb* and do not consider their food to be *halâl*. Imâm Abu Zahra, in his book on the history of the Islamic schools (*Târikh al-Madhâhib al-Islâmiyyah*), said that there are two Zaidî *madhabs*, the one before his death and the one that emerged after his death. After the problems that occurred with the Khalīfah Al-Mansur, the Zaidî *madhhab* became weak and other Shî'a Imâms began to influence it. Some of these Imâms did not approve of the Khalīfah of Abu Bakr and 'Umar and this appeared to become an inherent part of the *madhhab*. However, at present the Zaidîs have gone back to Imâm Zaid's views. Two of the scholars who followed the early *madhhab* of Imâm Zaid are Imâm Shawkânî and Imâm Muhammad ibn Isma'îl al-San'ânî.

The Zaidî School's opinions have been codified in two ways.

First, they are codified by his works. His school was documented in *al-Majmû'*, which was documented by his student Abu Khâlid Amr ibn Khâlid Wâsifi. The *Grand Majmû'* or *al-Majmû' al-Akbar* is made up of two sections, *Majmû' al-Hadîth* and *Majmû' al-Fiqh*. The commentary on this book *al-Rawdhah al-Nadhîr Sharh Majmû' al-Fiqh al-Kabîr* by Sharafuddîn Yahya al-San'ânî is famous.

⁶⁸ The Committee, *Mawsû'ah al-Adyân al-Muyassarâh*, pp. 291-92.

Second, they are codified by his students' works. After Imâm Zaid's death, many students from his *madhhab* emerged, especially in Yemen. The most interesting thing about this *madhhab* is that they never closed the door to *ijtihād*. Al-Hasan ibn 'Alī (al-Nâsir al-Kabîr) (304/917), al-Qâsim ibn Ibrahim (242/856) and his grandson al-Hâdi Yahya (288/901), who founded the Zaidiyyah state in Yemen, are especially more famous Zaidî *mujtahids* who collected the *Madhhab*.⁶⁹

This *madhhab* is very close to that of Abu Hanîfa's in the areas of *Mu'âmalât* or transactions. Nowadays, this *madhhab* is said to be the closest to the four popular *madhabs* of Abu Hanîfa, Mâlik, Shâfi'î and Hanbal. The sources of law in the Zaidî school are the Qur'an, the *Sunnah*, *ijmâ'*, *qiyâs*, *Istihsân*, *al-maslahah al-mursalah*, and *hukm al-'aql*. The *mujtahids* of Zaidî school have improved these sources and used them.

Followers of the Zaidî *fiqh* recognize the first four Twelve Imâms but they accept Zaid ibn 'Alī as their "Fifth Imâm" instead of his brother Muhammad al-Bâqir. After Zaid ibn 'Alī, the Zaidî recognize other descendants of Hasan ibn 'Alī or Husayn ibn 'Alī to be Imâms. Other well-known Zaidî Imâms in history were Yahya ibn Zaid, Muhammad al-Nafs al-Zakiyah and Ibrahim ibn 'Abdullah.

We should mention that the second founder of the Zaidî school and one of the most famous scholars of the *madhhab* of Imâm Zaid is Imâm Shawkânî, who died in 1250 in Yemen. His writings show that he was against *taqlîd*. They also show that he treated all *madhabs* equally, including the *Zaidîs*, and in the issues concerning *Aqîdah* he did not go against that of the *Salaf* at all. Imâm Shawkânî's books include *Nayl al-Awtâr* on *hadîth* and *Fath al-Qadîr* on *Tafsîr*.

Another major scholar of the Zaidî school is Imâm Muhammad ibn Isma'îl al-San'ânî (1059-1182). He was born in Yemen and moved to Mecca where he developed into an extremely capable *mujtahid*. He rejected the *taqlîd* and was severely challenged by those who refused the concept of *ijtihād*; however, he held his ground and never paid attention to his objectors. One of his many books is *Subul al-Salâm* on *hadîth*. Both *Subul al-Salâm* and *Nayl al-Awtâr* are now considered to be extremely essential for their contributions in the area of *fiqh* and *hadîth*.⁷⁰

4.2.8 The Ibâdhî School

The Ibâdhî school is associated with the name of 'Abdullah ibn Ibâdh (86/705),

⁶⁹ Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*, p. 68.

⁷⁰ Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 173-75; Muhammad Abu Zahra, *al-Imâm Zaid* (Cairo: Dâr al-Fikr al-Arabî, 1997), pp. 349-60; Momen, *An Introduction to Shi'î Islam*, pp. 127-222.

but they came to be known by this name and developed into an independent law school in the third century H (ninth century CE). The main contributor to this school was Jâbir ibn Zaid al-Azdî (93/711), a student of a number of Companions such as Anas ibn Mâlik, ibn Mas'ûd, 'Âishah, ibn 'Umar and ibn 'Abbas. The chains of students after Jâbir were Muslim ibn Abu Karîmah, al-Rabî' ibn Hatîb, Mahbûb ibn al-Rahîl and Muhammad ibn Mahbûb. The most important book of their school is *Dîwân Jâbir ibn Ziyâd*, which *Ibâdhîs* followed and on which they based their law school.⁷¹

The approved method among early *Ibâdhî* authorities on the formulation of legal opinions was that the decision in any legal case should be based in the first instance on the Qur'an; if there was no ruling to be derived from the Qur'an, then the *Sunnah* should be consulted. If it was not dealt with in the *Sunnah*, it should be taken from the consensus of the Companions (*ijmâ' al-Sahâbah*), and if the Companions were not agreed, then the utmost care must be taken to choose the best of the Companions' opinions. In any case, where no previous decision on the question could be found via the above-mentioned sources, the decision should then be derived from the opinions of the early authorities of the *Ibâdhî* school and the soundest opinions must be followed. At all times each learned man was allowed individual judgment (*al-ra'y*). 'Âlim is one who possesses a full knowledge of the Qur'an, *Sunnah* and the opinions of previous authorities, and each ignorant man (*Jâhil*) is forbidden such judgment. It was a recognized principle among *Ibâdhîs* that the *Sunnah* judges about the Qur'an, and *ra'y* judges about the *Sunnah*. The application of this principle appeared in the rules and laws as laid down by *Ibâdhî* authorities for the stage of secrecy (*maslak al-kitmân*) of their community. Via analogical reasoning, *Ibâdhîs* regarded the stage of secrecy of their movement as identical with the corresponding stage of the Prophet's life and the Muslim community during the Meccan period.

Al-Rabî' ibn Habib, one of Abu 'Ubaydah's students, succeeded him as leader of the *Ibâdhî* community in Basra. The work that contains the *Ibâdhî* collection of *hadîth* is *al-Jâmi' al-Sahîh*, also called *Musnad al-Rabî' ibn Habib*. (The original version of the book composed by al-Rabî' ibn Habib is not in common use; the current version is Abu Ya'qub Yusuf ibn Ibrahim al-Warîjlânî's rearrangement, entitled *Tartîb al-Musnad*, which contains a total of 1005 traditions, including the narrations added by Abu Ya'qub.) Most of the traditions reported by al-Rabî' ibn Habib is reported by other Sunnî sources with the same wording or with slight differences. However, the *Ibâdhî* collection contains a number of traditions that were not included in the Sunnî collec-

⁷¹ Zuhaylî, *al-Fiqh al-Islamî*, vol. I, pp. 59-62; Amr Khalifa al-Nami, *al-Ibâdhîyah* ('Uman: The Ministry of Awqaf & Religious Affairs, 2007) pp. 23-69; Sultanate of Oman. See: http://www.tawait.com/monthly/Nami_Ibâdhîya/Ibâdhîa_1.pdf (accessed 8.7.2009); *Studies in Ibâdhism*; Auda, *Maqâsid al-Shari'ah as Philosophy of Islamic Law*, p. 68.

tion and were described by them as being invented (*mawdhû'*). Likewise, a number of traditions regarded as authentic by Sunnî authorities are considered lies or innovations (*bida'*) by Ibâdhî authorities. The *Ibâdhî* legal system was derived from the material reported solely by Ibâdhî authorities.⁷²

4.2.9 Extinct Schools of Law

We cannot say that the founders of such schools are founders of *madhhabs* because they have no adherents. But they are also *mujtahids*. We could say they are founders of extinct schools of *fiqh*.⁷³

4.2.9.1 Al-Awza'î School

'Abd al-Rahman ibn 'Amr Abu 'Amr, born in Ba'albek (88/757-157/774) was the founder of a law school as well. He had gained a reputation for his ascetic tendencies and good character, and was called the Imâm of Syria. He even had followers in the Maghreb before they went over to the school of Mâlik. Among his contemporaries were Sufian, Mâlik, Ibn al-Mubâarak, and others. According to Higl, who was the most reliable of the persons who quoted al-Awza'î, the latter decided 10,000 legal questions. But according to another version, the number was 80,000. 'Abd al-Rahman ibn Mahdi said: "The *Imâms* of *hadîth* are four, al-Awza'î, Mâlik, Sufian al-Thawri, and Hammâd ibn Zaid." al-Awza'î was from *ahl al-hadîth*.⁷⁴

Very few of al-Awza'î's writings survive, but his style of Islamic jurisprudence (*usûl al-fiqh*) is preserved in Abu Yusuf's (798) book *al-Radd 'ala Siyar al-Awza'î*, in particular, his reliance on the "living tradition" or the uninterrupted practice of Muslims handed down from preceding generations. For Awzai, this is the true *Sunnah* of Muhammad. Al-Awza'î's school flourished in Syria, the Maghreb, and Muslim Spain but was eventually replaced by the Mâlikî school of Islamic Law in the 9th century. However, given his authority and reputation as an Imâm and pious ancestry, his views retained potential as a source of law and basis for alternative legal approaches and solutions. He died in 774 and was buried near Beirut, Lebanon, where his tomb is still visited today.⁷⁵

⁷² Amr Khalifa al-Nami, *al-Ibâdhîyah* (Sultanate of Oman: The Ministry of Awqaf and Religious Affairs).

⁷³ Hallaq, *The Origins and Evolution of Islamic Law*, p. 7

⁷⁴ Aghnides, *Islamic Theories of Finance*, p. 146.

⁷⁵ Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 173-75; John L. Esposito, *The Oxford dictionary of Islam*, (Oxford University Press US, 2004), p. 30; for more information see, Hussein F. Kasasbeh, *The Office of Qâdhî in the Early 'Abbâsid Caliphate, 132-247/750-861*, (Deanship of Research and Graduate Studies, Mu'tah University, 1994).

4.2.9.2 Al-Thawrî School

Abu 'Abdullah Sufian ibn Sa'îd of Kufa (716-778) was a *Tâbi'î* Muslim scholar, *Hâfiz* and full *mujtahid*, the founder of the Thawrî school. Among those who quoted him were Mâlik, al-Awza'î, and others. He was well known for his piety and his thorough knowledge of the *hadîths*. Abu 'Âsim said of him: "al-Thawrî is the Commander of the Believers in the matter of *hadîths*." His jurisprudential thought (*usûl al-fiqh*), after his move to Basra, became more closely aligned with that of the Umayyads and of al-Awza'î. He is reported to have regarded *jihâd* as an obligation only in the event of a defensive war.⁷⁶

Al-Thawrî was one of the "Eight Ascetics [*mutasawwifs*]" who included (the usual list) 'Âmir ibn 'Abd al-Qays, Abu Muslim al-Khawlani, Uways al-Qarani, al-Rabî' ibn Khuthaym, al-Aswad ibn Yazid, Masruq ibn al-Ajda' and Hasan al-Basri.

The most well known of his books, perhaps, is his *Tafsîr* of the Qur'an, one of the earliest in that genre. An Indian manuscript purports to preserve it up to Qur'an 52:13, as published by Imtiyâz 'Alî 'Arshî in 1965. Also, Tabarî's *Tafsîr* quotes extensively from the whole text. Al-Thawrî also preserved the books of his Umayyad predecessors. He spent the last year of his life hiding after a dispute between him and Caliph al-Mahdi.

After his death, the al-Thawrî *madhhab* was taken over by his students, including Yahya al-Qattan. His school did not survive, but his juridical thought and especially his transmission of *hadîths* are highly regarded among scholars, and have influenced all the major schools.⁷⁷

4.2.9.3 The al-Laith ibn Sa'd School

Al-Laith ibn Sa'd ibn 'Abdur-Rahmân al-Fahmi was born in Sha'bân in 94/713 in Qarqashandah, a village twenty-two kilometers from Fustât in Egypt and died in 175/791 in Cairo. His origins go back to Esfahan, Persia (now Iran). He was one of the great Imâms of jurisprudence and the Imâm of the Egyptians. A pious, ascetic, truthful scholar who abstained from unlawful acts, he was also sincere, humble, forbearing and kind-hearted when dealing with people. He is the Imâm, the *Hâfiz* (a title given to whoever memorizes 100,000 *hadîths*), the *shaikh* of Islam, the jurist and scholar of Egypt.

⁷⁶ Ibn Khallikân, *Wafayât al-A'yân*, vol. II, pp. 322-326; Aghnides, *Islamic Theories of Finance*, pp. 146-47.

⁷⁷ Ibn Khallikân, *Wafayât al-A'yân*, vol. II, pp. 322-26; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, p. 179.

He started to acquire religious knowledge in his early years. He was a student of some of the greatest scholars of his time, such as 'Ubaydullâh ibn Ja'far, Ja'far ibn Rabi'ah, al-Hârith ibn Yazîd and Yazîd ibn Abu Habib. Al-Laith had high aspirations regarding study. For him, what Egypt alone had to offer was not sufficient. In 113 AH, he decided to travel to Hijâz to perform *Hajj* and seek knowledge. He was twenty years old at that time.

In Mecca and Medina, which were considered the most outstanding sources of religious knowledge in the Muslim world, Al-Laith started to learn jurisprudence and *hadîth* from a unique group of scholars. Ibn Shihâb al-Zuhri was known as the most knowledgeable *Hâfiz* and one of the first scholars to write down the *hadîths* of the Prophet, and he was one of Al-Laith's teachers. Al-Laith also received religious knowledge from 'Ata' ibn Abu Rabah, who was the *muftî* and jurist of Mecca, ibn Abu Malîkah, Nâfi' Ad-Daylami, who was the freed slave of the revered companion 'Abdullah ibn 'Umar ibn al-Khattâb, Sa'îd ibn Sa'îd al-Maqbari, Abu Az-Zubayr al-Makki and many others. Al-Layth was of the second generation *tabi'în*. Some major scholars of the *tabi'în* he sat with other than Nâfi' were Az-Zuhrî, Yahyâ ibn Sa'îd Al-Ansârî, Ibn 'Ajlân, Hishâm ibn 'Urwah, 'Atâ ibn Abî Rabâh, Sa'îd Al-Maqburî (famous for his reports from Abû Hurayrah) as well as hundreds more. Many famous scholars took from him in *Hadîth* including Ibn Wahb (student of Imâm Mâlik), Abdullah ibn Al-Mubâarak and hundreds more known to the specialists of the sciences of *hadîth*.⁷⁸

After spending many years acquiring knowledge, Imâm Al-Laith was prominent among his contemporary scholars as a brilliant jurist and a trustworthy narrator of the Prophetic *hadîths*. He started a class in his mosque to teach people and a short while later became very famous: students came from everywhere to learn from him. He was one of the most prominent jurists of his time, well known among people everywhere. The caliphs and Emîrs became acquainted with him and scholars praised him and testified to his profound knowledge, his ability to memorize and his mastery of religious affairs.

Imâm al-Laith occupied several posts. He was the head of the Administration of Finance during the reign of Sâlih ibn 'Ali ibn 'Abdullah ibn 'Abbas of Egypt. He was also its head during the caliphate of the 'Abbasid Caliph, al-Mahdi. Previously, the 'Abbasid Caliph Abu Ja'far al-Mansûr asked him to be the ruler of Egypt, but Imâm al-Laith declined.⁷⁹

⁷⁸ Al-Dhahabî, *Siyar A'lâm al-Nubalâ*, vol. VIII, 136-62.

⁷⁹ Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, p. 179.

4.2.9.4 The Ibn Jarîr al-Tabarî School

Abu Ja'far Muhammad ibn Jarîr al-Tabarî (838-923) was one of the earliest, most prominent and famous Persian jurists, historians and exegetes of the Qur'an who wrote exclusively in Arabic. He is most well known for his *Târikh al-Tabarî* (*Târikh al-Rusul wa al-Mulûk* or *Târikh al-Tabarî*=History of the Prophets and Kings) and *Tafsîr al-Tabarî* (*Jâmi' al-bayân fi Ta'wîl al-Qur'an* or *Tafsîr al-Tabarî*). *Ikhtilâf al-Fuqahâ* was a comparative study of Islamic law schools. He learned *fiqh* from the Shâfi'î school, the Mâlikî school and *fiqh* from *ahl al-Iraq* but remained an independent *mujtahid*. He attempts in *Ikhtilâf al-Fuqahâ* to account for how the opinions used by the schools, if in theory derived from the same principles as is the *Sunnah*, are often in conflict with one another. Al-Tabarî ratifies the opinions of certain authorities by detailing their relationship to the revelation through the medium of the *Sunnah* and the practice of later generations.⁸⁰

He did not hesitate to express his independent judgment (*ijtihâd*), stating his view as to which of the sources he cited was accurate. This was, more understandably, an aspect of his law than of his history. This does not mean he saw himself as innovative. On the contrary, he was very much opposed to religious innovation. In general, Tabarî's approach was conciliatory and moderate, seeking harmonious agreement between conflicting opinions.

He characterized himself as a Shâfi'îte in law and the Shâfi'îtes were happy to have him view himself as such. He was later seen as establishing his own school. Although he had come to Baghdad in his youth to study with ibn Hanbal, he incurred the vehement wrath of that school. Tabarî's *madhhab* is usually called *Jarîrî*. However, in the keenly competitive atmosphere of the times, his school did not survive.⁸¹

4.2.9.5 Sufian ibn 'Uyainah School

Sufian ibn 'Uyainah ibn Maymûn al-Hilali al-Kufi (198/814) was a faithful memorizer, and the Imâm of the Sacred Masjid of Mecca. He was one of the leaders of the study of *hadîths*. He was an Imâm, a *hâfiz*, a proof (*hujjah*), possessing immense knowledge and great ability, and a *muhaddith* (scholar of *hadîths*) of the Haram of Mecca. Imâm al-Shâfi'î said that without Mâlik and Sufian the knowledge of Hijaz (Mecca and Medina) would have been lost. He also said that he found Sufian to have

⁸⁰ Cf. Melchert, *The Formation of the Sunnî Schools of Law, 9th-10th Centuries*, pp. 191ff.

⁸¹ Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 180-81; Brannon M. Wheeler, *Applying the Canon in Islam: the Authorization and Maintenance of Interpretive Reasoning in Hanafî Scholarship*, (SUNY Press, 1996), pp. 94-100.

all but six *hadīths*.⁸²

We would like to give here Bediuzzaman's explanation of Sufian ibn 'Uyainah:

At this time, however, due to the supremacy of natural philosophy and the preponderance of the conditions of worldly life, minds and hearts have become scattered, and endeavor and favor divided. Minds have become strangers to non-material matters. Thus, it is because of this that if someone now was to memorize the Qur'an at the age of four and have the intelligence of a *mujtahid* like Sufian ibn 'Uyainah, who held discussions with religious scholars at an early age, he would need ten times longer than Sufian to become qualified to interpret the law. If Sufian acquired the learning in ten years, this man would need one hundred years. Because the period of Sufian's natural study began at the age of reason. His disposition and abilities were slowly prepared and illuminated; they took lessons from everything and became like a match. But his counterpart at the present time, since his thought is submerged in philosophy, his mind plunged in politics, and his heart is giddy at the life of this world, his disposition and abilities have grown distant from interpretation of the law. For sure, they have become distant from interpretation of the Sharī'ah to the degree they have been preoccupied with the modern sciences, and have remained backward in regard to it to the extent he has become learned in the physical sciences. Therefore, he may not say: "I am as intelligent as him. Why can't I become on a level with him?" He does not have the right to say this, and he cannot be on a level with him.⁸³

4.3 Some Theological Schools and their Opinions on *Fiqh*

4.3.1 Some Considerations

The origin of this distinction between *ahl al-sunnah* and *ahl al-bid'ah* (heresy) is based, among other things, on the following statement by the Prophet: "Verily, it shall happen to my community [ummah] what happened to the Sons of Israel. The Sons of Israel split up into 72 sects, and my community shall split up into 73 sects, namely, one more than their sects; all of these sects shall go into the Fire except one." They said: "Oh Prophet of God, which is the one sect that will stay away from the Fire?" He replied: "The sect in which I and my Companions have belonged."⁸⁴

The test of *ahl al-sunnah* then is to hold the same views as the Companions. The content of *ahl al-sunnah* consists for the most part in agreement on a great many

⁸² Al-Dhahabī, *Siyar A'lām al-Nubalā*, vol. VIII, pp. 454-75; Ibn Khallikān, *Wafayāt al-A'yān*, vol. II, pp. 326-29; Salaahud-Deen 'Ali Abdul Mawjood, *Imām Sufian ibn 'Uyainah*, trans. Abu Bakr ibn Nasir (Riyadh: Dar-us Salam Publications 2006).

⁸³ Bediuzzaman, "Twenty-Seventh Word," *The Words*, pp. 496-97.

⁸⁴ *Sunan al-Tirmidhi*, Hadīth No.171: Abdulqahir al-Baghdadi (429/1037), *al-Farq bayn al-Firaq* (Beirut: Dar al-Ma'rifah, d.n) pp. 4-11.

heads or “pillars” as they call them. Each of these “pillars” must be understood by every adult person of mature understanding. These “pillars” include the fundamental (*usûl*) and secondary (*furû‘*) questions. On the fundamental questions all the *ahl al-sunnah* Muslims were one, although they differed on the secondary points. But their differences were not a matter of error ((*dhalâl*) or impiety (*fisq*).

These pillars embrace a wide range of subjects, including metaphysical questions on matter, accidents and essence, dogmatic theology concerning such matters as the existence, unity, attributes and names of God, the createdness of the universe, the prophets and their miracles, and issues of worship, such as the observation of the five “pillars” of Islam, *fiqh*, public law, such as the question of the caliphate, etc.⁸⁵

4.3.1.1 What is Difference between Islam and Îmân?

The Prophet defined Islam as consisting in the observance of “the five pillars,” namely the creed that there is no God but God and that Muhammad is his Prophet, the five prayers, *zakâh*, fasting during the month of Ramadhân, and the pilgrimage to Mecca. In other words, Islam is the external submission and differs from *îmân* (faith) which means internal submission. This distinction is also acknowledged by al-Bukhârî, although there are those who have considered the two terms synonymous. The opposite of *îmân* is *kufr*, meaning unbelief. According to the view that *îmân* means internal submission only, *kufr*, or unbelief, would not exclude a person from Islam. The majority of *faqîhs* and theologians agreed that Muslims do not become unbelievers (*kâfir*) by erring in the fundamentals of religion (*usûl al-dîn*), that is, in dogma. If a Muslim errs in something other than dogma, if he can justify his opinion by some evidence (*burhân*), then he is saved (*nâjî*). Even if he bases his opinion on the erroneous view of another person (*taqlîd*) he is still saved, according to the majority view. According to one opinion, Muslims are allowed to call other Muslims *kâfirs* as retaliation for the same insult.⁸⁶

The differences between *Islam* and *îmân* (faith=belief) have frequently been the subjects of discussion among Islamic scholars. One group has said that they are the same, while another has said that they are not the same but the one cannot exist without the other. They have expressed various similar ideas. There is a subtle difference between the two terms:

Islam is a preference, while belief is a conviction. To put it another way, Islam

⁸⁵ Abdulqahir al-Baghdadi (429/1037), *Usûl al-Dîn* (Beirut: Dar al-Kutub al-Ilmiyyah, 1981), pp. 318-43; *al-Farq bayn al-Firaq*, pp. 11-12; Tashkopruzadeh (968/1560), *Miftâh al-Sa’âdah*, vol. II, pp. 194-257; Aghnides, *Islamic Theories of Finance*, pp. 133-35.

⁸⁶ Colin Turner, *Islam without Allah?: the Rise of Religious Externalism in Safavid Iran*, (Routledge, 2000), pp. 8-10.

takes the side of the truth and is submission and obedience to it, and belief is acceptance of and assent to the truth. We could see certain irreligious people who fervently support the injunctions of the Qur'an. That is to say, such people by taking the part of the truth in one respect were Muslims and were called "irreligious Muslims." And we could see certain believers who did not show any support for the injunctions of the Qur'an; they did not support them and were thus called "non-Muslim believers."

Just as Islam without belief cannot be the means of salvation, neither can belief without Islam.⁸⁷

4.3.1.2 Who is a Muslim?

This question has been variously answered. Some say that every person who believes in Muhammad as a prophet belongs to the Muslim community (*millah al-Islâm*). The Qarâmites claim that every person who says, "There is no God but God, and Muhammad is the prophet of God" is a Muslim. Still others say that every person who believes in the five prayers and in saying them with one's face turned toward Mecca is a Muslim. In our view, a person is a Muslim if he believes in the six pillars of faith until he or she deny one of six pillars. That means that a person is a Muslim if he believes in the createdness of the universe, the unity, eternity, justice and wisdom of its Creator, would not place others on the same level as God nor deny any of His attributes, if he believes in the prophecy and mission of all the prophets, and in the truth of the prophecy of Muhammad, as well as in his mission to all nations, if he believes in his teachings and the Qur'an as the source of divine revelation, finally, if he believes in the obligation of the five prayers, giving *zakâh*, the fast of Ramadan, and the pilgrimage to Mecca.⁸⁸

We should not forget that belief (*îmân*) is a light produced by affirming in detail all the essentials of religion brought by the Prophet and the rest in general. The inability to state something clearly does not indicate its non-existence. Mostly, the tongue is incapable of interpreting the subtleties of what the mind conceives of. Similarly, the intellect cannot contemplate the hidden secrets of the conscience, so how should it interpret all of them? In consequence, one can establish whether or not an ordinary person believes by questioning him and seeking an explanation. You can question him both positively and negatively, saying: "O you common man! Is it possible according to your way of thinking that the Maker in the grasp of Whose power are all six aspects of the world, should be present in just one place of it?" If he replies negatively, then

⁸⁷ Bediuzzaman, *Letters*, Ninth Letter, pp. 52-53.

⁸⁸ Abdulqahir al-Baghdadi, *Usûl al-Din*, pp. 248-52; *al-Farq bayn al-Firaq*, pp. 12-14; Aghnides, *Islamic Theories of Finance*, pp. 135-38.

the fact that Allah is beyond the restrictions of space is firmly established in his conscience, and that is sufficient for him. You can think of further examples in the same way.⁸⁹

According to some scholars, the person who observes all the above is a Muslim. In addition, if such a person abstains from any heresy (*bid'ah*) that involves unbelief he is a Sunnî Muslim. If, on the contrary, he commits a heresy, there are two possibilities.

(1) The heresy is of the kind committed by the Bâtinites, Bayânites, Mugirites, Mansurites, Janâhites, Sabbâbites, Khattâbites (subdivisions of the Râfidites), the Hululites, those who believe in the transmigration of souls, the Maymunites or Yazidites (both subdivisions of the Khârijites), the Hâitites or Himârites (subdivisions of the Qadarites), or the heresy consists in prohibiting what the Qur'an permits by name, and *vice versa*. In such cases, the individual does not belong to the Muslim community (*millah al-islam*).

(2) The heresy is of the kind committed by the Zaidîtes and Imâmites (subdivisions of the Shî'a), most of the Khârijites, the Mu'tazilîtes, Najjârites, Jahmites, Dirârites and Mujassimites. In this case the individual is considered to be a Muslim in certain respects but not part of the Muslim community. For example, like other Muslims, he is buried in the Muslim cemetery, receives a share in the spoils of war, and may enter a Muslim mosque to pray in it. However, a Sunnî Muslim is not allowed to pray over his dead body, to pray under his leadership (*al-salâh khalfahû*) nor to eat his sacrifice. Nor may a Sunnî marry women of his sect or offer him a Sunnî woman in marriage. In short, these are three classes of Muslims, the Muslims who are Sunnîs, those who are merely Muslims, and finally those who are Muslims in name only but not in reality, such as the Maymunites and Hululites.

The reason why certain groups of Muslims have been considered heretical is not because they differed in the application or even the theory of *fiqh*, since the *ahl al-sunnah* schools will be found to differ among themselves almost as much. It is mainly because of differences on theological and political issues, for these were the principal issues that led to their secession from the main body of Muslims.⁹⁰

⁸⁹ Bediuzzaman, Said Nursi, *Signs of Miraculousness: The Inimitability of the Qur'an's Conciseness*. Trans. by Shukran Wahide, (Istanbul: Sozler Publications, 2007), pp. 37-38.

⁹⁰ Abdulqahir al-Baghdadi (429/), *Usûl al-Din*, pp. 248-52; *al-Farq bayn al-Firaq*, pp. 14-28; Aghnides, *Islamic Theories of Finance*, pp. 135-38.

4.3.2 Some *Ahl al-Bid'ah* Theological Schools

4.3.2.1 Mu'tazila=*Qadariyyah* (Opponents of *Qadar*)

Mu'tazila is a theological school of thought within Islam, anglicized as *Mu'tazilite*. They are usually not accepted by other *Sunnî* Muslims, although their theology parallels *Shî'a* Islam, such as their belief in free will, the promotion of justice, and prohibition of evil. The name *Mu'tazilî* is thought to originate from the Arabic root (*i'tazala*) meaning "to leave," "to withdraw." Another name is *Qadariyyah*. *Qadariyyah* (the name is based on the Arabic word *qadar*, meaning "fate") was a theological movement in early Islam that held that human beings were endowed by God with free will. *Qadariyyah* resisted the Umayyad caliphs' claims to be the ordained rulers of all Muslims by God himself and, for that reason its proponents, the Qadarites, supported the Abbasid revolution. Like many early theological movements, some of which had views incompatible with *Qadariyyah*, the Qadarites claimed to be the ideological descendants of Hasan al-Basri.⁹¹

Mu'tazilî theology originated in the 8th century in Basra ('Iraq) when Wâsil ibn 'Atâ (131/748) stopped attending al-Hasan al-Basri's classes after a theological dispute regarding the issue of *al-Manzilah bayna al-Manzilatayn* (the intermediate position). This position holds that Muslims who commit grave sins and die without repentance are not considered *neither mu'mins* (believers) *nor do kâfirs* (unbelievers) but occupy an intermediate position between the two. Thus, Wâsil ibn 'Atâ and his followers, including 'Amr ibn 'Ubayd (144/ 761), were called *Mu'tazilî*. The *Mu'tazilîs* later called themselves *Ahl al-Tawhîd wa al-'Adl* (People of Divine Unity and Justice), based on the theology they advocated, which sought to ground the Islamic creed in reason. The leaders of this school mentioned Abu 'Alî Juba'i (303/915) and Qâdhî Ahmad ibn Abu Dawud, who instigated the Abbasid caliphs to commit cruelty against *Sunnî* scholars. With these provocations, the *Mu'tazilî* school became the official school of thought in the Abbasid caliphate.⁹²

The main issue in Islamic Law is the power of the intellect (reason=*ʿaql*) as a source of law like revelation. The *Mu'tazilîs* had a nuanced theory regarding reason,

⁹¹ Ibn Khallikân, *Wafayât al-A'yân*, vol. V, p. 3-7; The Committee, *Mawsû'ah al-Adyân al-Muyassarrah*, pp. 452-53; Ali Sâmî al-Nashshâr, *Nash'ah al-Fikr al-Falsafî fi al-Islam*, (Cairo: Dâr al-Ma'ârif, d.n.), pp. 373-441.

⁹² Al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, v. VIII (Beirut: Dar al-Kutub al-Ilmiyyah, 1998), pp. 364-69, 409-16; Sa'd-al-Dîn Mas'ud ibn 'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, v. I (Beirut: Dar al-Arqam, d.n) pp. 405-18; Ahmed Qalqashandî, *Subh 'ûl-A'şâ fi Sina'ah al-Insha*, vol. XIII (Cairo: Dâr al-Kutub al-Misriyyah, 1913), pp. 251-53; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. II, pp. 163-78; Abdalqahir al-Baghdadi, *Usûl al-Din*, pp. 335-37; Seyyed Hossein Nasr, *Islamic Philosophy from its Origin to the Present: Philosophy in the Land of Prophecy* (Albany: SUNY Press, 2006), pp. 126-27.

divine revelation and the relationship between them. They celebrated the power of reason and the human intellect. To them, it is the human intellect that guides a human in knowing God, His attributes and the very basics of morality. Once this foundational knowledge is attained and one ascertains the truth of Islam and the divine origins of the Qur'an, the intellect then interacts with scripture, such that both reason and revelation come together as the main source of guidance and knowledge for Muslims. They have claimed an extensive use of rationality in the development of their religious views, saying: *"It is not surprising that opponents of the Mu'tazila often charge the Mu'tazila with the view that humanity does not need revelation, that everything can be known through reason, that there is a conflict between reason and revelation, that they cling to reason and put revelation aside, and even that the Mu'tazila do not believe in revelation. But is it true that the Mu'tazila are of the opinion that everything can be known through reason and therefore that revelation is unnecessary? The writings of the Mu'tazila give precisely the opposite portrait."*

In their opinion, human reason is not able to know everything, and therefore humans need revelation in order to reach conclusions concerning what is good and what is bad for them.⁹³ That is, there are three classes of acts.

A) The *first* is that the intellect is competent on its own to discover morality. For instance, according to the Mu'tazilîs, the intellect can know, independently of revelation, that justice and telling the truth (*sîdîq*) are morally good. God is under an obligation to order humanity to abide by these.

B) The *second* class of acts covers those of which the intellect can discover their inherent evil and ugliness (*qubh*), such as injustice, mendacity or being in a state of ignorance of the Creator. God cannot do anything else but prohibit these.

C) The *third* class is comprised of those acts to which the human intellect is incapable of assigning moral values. These are known only through revelation and they are recognized as morally good if God orders them or as morally wrong if God forbids them. In short, the human intellect is capable of knowing what is right and what is wrong in a very general sense. Revelation is given by God to detail what the intellect summarizes and to elaborate on the broad essentials. Revelation and reason complement each other and cannot dispense with each other.

The conflict between Mu'tazilîs and Ash'arîs concerning this point was a matter of the focus of obsession (*ijbâr*). Mu'tazilîs were obsessed with divine justice, whereas the Ash'arîs were obsessed with divine omnipotence. Nevertheless, divine self-restraint in Mu'tazilî discourse arises because of divine omnipotence and not as a ne-

⁹³ Al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-69, 409-16; Sa'd-al-Dîn Mas'ud ibn 'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. I, pp. 405-18; M.M Sharîf, *A History of Muslim Philosophy*, vol. I, pp. 199-219.

gation of it.

Another issue is authenticity of reports. Mu'tazilīs declare as true all that is established by *mutawâtir* reports, by which we know what the Messenger of God has said. And that which was narrated by only one or two transmitters, or by one for whom error was possible, such reports are unacceptable in religion (*al-diyânât*) although they are acceptable for the proceedings of positive law (*furû' al-fiqh*) as long as the narrator is trustworthy, competent, just and has not contradicted what is narrated in the Qur'an.⁹⁴

We can summarize some principles of Mu'tazila:

a) The Mu'tazilītes, who wanted to avoid everything that might compromise the oneness of God (*tawhīd*), denied the doctrine that the Qur'an was uncreated and eternal.

b) On the question of the relationship of faith (*īmān*) to works (*'amal*), the Mu'tazilītes taught, like the *Khawârij*, that works were an essential part of faith but that a person guilty of grave sin (*kabīrah*) was neither a Muslim – unless he repented – nor a non-Muslim but occupied a "middle ground" (*al-Manzilah bayna al-Manzilatayn*).⁹⁵

c) People were free to choose and act and, therefore, created for their actions (*khalk al-af'âl*).

d) Divine predestination of human acts, they held, was incompatible with God's justice and human responsibility (*adâlah*).

e) They claimed that human reason was capable of discovering, independent of revelation, what was good and what was evil, although revelation corroborated the findings of reason.

The function of revelation was twofold. *First*, it was to aid humans in choosing the right, because they often falter in the conflict between good and evil. God, therefore, must send prophets, for he must do the best for humankind. *Secondly*, revelation was also necessary to communicate the positive obligations of religion, e.g., prayers and fasting, which could not be known without revelation.

God was viewed as pure Essence (*Zât*) without eternal attributes (*sifât*) because this school held that the assumption of eternal attributes in conjunction with Essence will result in a belief in multiple coeternals and violate the pure unadulterated unity of

⁹⁴ Al-Sayyid Sharīf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-69, 409-16; Abdulqahir al-Baghdadi, *Usûl al-Din*, pp. 335-37; 'Abd al-Jabbar in 'Abd al-Karim 'Uthman (ed.), *Sharh al-Usûl al-Khamsa* (Cairo: Maktabat Wahba, 1965); Abu al-Hasan al-Ash'arī in Muhammad 'Abd al-Hamid (ed.), *Maqâlat al-Islâmīyyin wa Ikhtilâf al-Musallīn* (Cairo: Maktabat al-Nahdah al-Misriyah, 1969).

⁹⁵ Al-Sayyid Sharīf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-78.

God. God knows, wills and acts by virtue of his Essence and not through attributes of knowledge, will and power.⁹⁶

4.3.2.2 Khârijîtes

Khârijîtes (*Khawârij*), literally “those who went out,” is a general term embracing various Muslims who, while initially supporting the caliphate of the fourth and final “rightly guided” caliph, ‘Ali ibn Abu Tâlib, they rejected him later. They first emerged in the late 7th century CE, concentrated in today’s southern Iraq. It is significant that Hurqus ibn Zuhair was elected as one of the heads of the Khârijîtes after the Battle of Siffîn, which was a battle for Muslim leadership with ‘Ali on the one side and the Mu‘âwiya on the other. This probably marks one of the most painful moments in the history of Islam. Many Companions on both sides were disheartened by this conflict. The necessity, therefore, for arbitration between the two parties was broached by a certain al-Ash‘ath ibn Qais. The proposal was accepted by both parties with Abu Musa al-Ash‘arî representing ‘Ali and ‘Amr ibn al-As representing the Mu‘âwiya.⁹⁷

Nonetheless, when the pact was read out by Ibn Qais a large group on ‘Ali’s side objected vehemently to its terms. Most of the members of this group belonged to the Bedouin Tamim tribe. Their spokesperson on this occasion was ‘Urwa ibn ‘Udaiyya, who said, “Are men to arbitrate in the affairs of Allah? There can be no arbitration except by Allah.” In support of his view he quoted the following Qur’anic passage: “*The prerogative of command rests with none but Allah. He declares the truth and he is the best of judges*” (6:57). ‘Ali’s response to this was typical: “There is a word of truth in what they say” he said, “but their ends are devious.”⁹⁸

‘Urwa, along with 12,000 others, then seceded from ‘Ali’s party. They initially set up camp at a place called Harawra on the outskirts of Kufa where they elected ‘Abdullah ibn al-Kawwa as their head. ‘Ali pursued them and engaged them in debate. Ibn al-Kuwwa conceded to Ali’s arguments and he, along with a few others, returned to his ranks.

The rest of the Khârijîtes then left for Nahrawan. Here they elected ‘Abdullah ibn Wahb al-Rasibi and the above-mentioned Hurqus ibn Zuhair as their leaders. Suffice it

⁹⁶ Al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-69, 409-16; Sa‘d-al-Dîn Mas‘ud ibn ‘Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ’iq al-Tanqîh*, vol. I, pp. 405-18; Mehmed ibn Ferâmûz Molla Khusraw (955/1480), *Mir‘at al-Usûl Fi Sharh-i Mirqât al-Wusûl* (Istanbul: Eser Publications, 1889), vol. I, pp. 276-80; Abdulkahir al-Baghdadi, *al-Farq bayn al-Firaq*, pp. 114-202.

⁹⁷ Mu‘awwadh and Abdulmawjûd, *Târikh al-Tashrî‘ al-Islâmî*, vol. II, pp. 4-6; *Mawsû‘ah al-Adyân al-Muyassarah* (Beirut: Dar al-Nafâ‘is, 2002), pp. 234-35; al-Qattân, *Târikh al-Tashrî‘ al-Islâmî*, pp. 199-205.

⁹⁸ Al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-69, 424-28.

to say that by now this group of Khârijîtes – known as the *Muhakkimah* had already decided on the following principles:

- a) The declaration of *kufr* (unbelief) for 'Ali, Mu'âwiya and all those who had participated in and agreed to the process of arbitration;
- b) *Takfir* (accusation of unbelief) of all those who disagreed with them on any theological issues;
- c) The right to kill any of the above;
- d) Acts ('*amal*') like praying and fasting are parts of *îmân* (faith), so whoever abandons these religious acts would become an unbeliever (*kâfir*).⁹⁹

Whereas the Shi'îtes believed that the Imâmâte (leadership) was the sole right of the house of Ali, the Khârijîtes insisted that any pious and able Muslim could be a leader of the Muslim community. And whereas the Sunnîs believed that the Imâm's impiety did not by itself justify sedition, the Khârijîtes insisted on the right to revolt against any ruler who deviated from the example of the Prophet Muhammad and the first two caliphs, Abu Bakr and 'Umar. From this essentially political position, the Khârijîtes developed a variety of theological and legal doctrines that set them further apart from both Sunnî and Shi'îte Muslims.

The only surviving group, the Ibâdî of Oman, Zanzibar and North Africa, reject the Khârijîte appellation and refer to themselves as *ahl al-'adl wal istiqâmah* (people of justice and uprightness). One of the early Khârijîte groups was the Harûriyya; it was notable for many reasons, including its ruling on the permissibility of female imâms and the fact that a Harûrî assassinated 'Ali.

The high point of the Khârijîtes' influence was during the years 690-730 around Basra in southern Iraq, which was always a center of Sunnî theology. Khârijîte ideology was a popular creed for those rebelling against the officially Sunnî caliphate, inspiring breakaway states and rebellions (like Maysara's) throughout the Maghreb and sometimes elsewhere.

They regarded the territory occupied by other Muslims as part of *Dâr al-Kufr*, the territory of unbelief where it was permitted to attack both people and goods – but also a territory from which one had to exile oneself, as Muhammad had exiled himself from Mecca to escape the unbelievers there. The most extreme were the *Azraqîs* or *Azâriqah*, founded in Persia in 685 by Nâfi' ibn ul-Azraq. These pronounced *takfir* on all other Muslims, considering them to be *kuffâr* (unbelievers) who could be killed

⁹⁹ Al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-69, 424-28; al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 199-205.

with impunity.¹⁰⁰

4.3.2.3 The Shī'a

The Shī'a is the second largest denomination in Islam, after Sunnī Islam. Shī'a Muslims, although a minority in the Muslim world, constitute the majority of the population in Iran, Azerbaijan, Syria, Turkey, Bahrain and Iraq, as well as in Lebanon.

The Shī'a movement dates from the period when a group of Muslims wanted 'Ali ibn Abu Tālib, the cousin and son-in-law of the Prophet, to become the caliph instead of Abu Bakr, who had been elected to be the first caliph following the death of Muhammad in 632. They advanced his candidacy on the basis of heredity but were outvoted. 'Ali ultimately became the fourth caliph, succeeding 'Uthman who had succeeded 'Umar who had in turn succeeded Abu Bakr. But 'Ali was overthrown by the rebellion by Mu'āwiya, the governor of Syria, whose seat was in Damascus. Mu'āwiya rebelled against 'Ali because he attributed the assassination of his kinsman 'Uthman to 'Ali's followers. 'Ali was subsequently assassinated after losing the *tahkīm* (arbitration) to Mu'āwiya. His followers then constituted what would today be called a political party to reinstate him and to secure succession to the caliphate.¹⁰¹

In 680 Hussain, one of 'Ali's sons led a number of Muslims who were then rebelling against the ruling caliph in an attempt to establish a caliphate in the area between Iran and Iraq based on the line of descent from the Prophet. But Hussain was lured into Iraq, and he and his followers were massacred at a place called Karbalā. Hussain's martyrdom spurred the Shī'a movement in Iraq and Iran, and the anniversary of Karbalā is commemorated every year by the Shī'a population. In Iran, in particular, it is conducted by means of a large popular demonstration in which people weep publicly and flagellate themselves as a sign of their remorse.¹⁰²

'Ali is the central figure in the origin of the Shī'a/Sunnī split that occurred in the decades immediately following the death of the Prophet in 632. Sunnīs regard 'Ali as the fourth and last of the "rightly guided" caliphs (successors to Mohammed as the leader of the Muslims) following Abu Bakr (632-634), 'Umar (634-644) and 'Uthman (644-656). The Shī'a feel that 'Ali should have been the first caliph and that the caliphate should pass only to direct descendants of Mohammed via 'Ali and Fātima. They often refer to themselves as *ahl al-bayt* or "people of the house" [of the prophet].

¹⁰⁰ Qalqashandi, *Subh 'ūl-A'ṣā fi Sina'ah al-Insha*, vol. XIII, pp. 222-30; Abdulqahir al-Baghdadi, *Usūl al-Din*, pp. 332-33; *al-Farq bayn al-Firaq*, pp. 72-114; The Committee, *Mawsū'ah al-Adyān al-Muyassarah*, pp. 234-35.

¹⁰¹ Mu'awwadh and Abdulmawjūd, *Tārīkh al-Tashrī' al-Islāmī*, vol. II, pp. 7-13; The Committee, *Mawsū'ah al-Adyān al-Muyassarah*, pp. 32-33, 102-03, 324-25.

¹⁰² Al-Qattān, *Tārīkh al-Tashrī' al-Islāmī*, p. 205-07.

When 'Uthman was murdered while at prayer, 'Ali finally succeeded to the caliphate. He was, however, opposed by 'Aisha, wife of the Prophet and daughter of Abu Bakr, who accused him of being lax in bringing 'Uthman's killers to justice. After Ali's army defeated 'Aisha's forces at the Battle of the Camel in 656, she apologized to 'Ali and was allowed to return to her home in Medina where she withdrew from public life.

But 'Ali was not able to overcome the forces of Mu'awiya Umayyad, 'Uthman's cousin and governor of Damascus, who also refused to recognize him until 'Uthman's killers had been apprehended. At the Battle of Siffin Mu'awiya's soldiers stuck verses of the Qur'an onto the ends of their spears with the result that 'Ali's pious supporters refused to fight them. 'Ali was forced to seek a compromise with Mu'awiya, but this so shocked some of his die-hard supporters who regarded it as a betrayal that he was killed by one of his own men in 661.

Mu'awiya declared himself caliph. 'Ali's elder son Hassan accepted a pension in return for not pursuing his claim to the caliphate. He died within a year, allegedly poisoned. 'Ali's younger son Hussein agreed to put his claim to the caliphate on hold until Mu'awiya's death. However, when Mu'awiya finally died in 680, his son Yazid usurped the caliphate. Hussein led an army against Yazid but, hopelessly outnumbered, he and his men were slaughtered at the Battle of Karbalâ (in modern day Iraq). Hussein's infant son 'Ali, survived, so the line continued. Yazid formed the hereditary Umayyad dynasty. The division between the Shî'a and what came to be known as the Sunnî had been set.¹⁰³

The Shî'a attribute themselves to the Qur'an and teachings of the final Prophet Muhammad, and in contrast to other Muslims, believe that his family, the Ahl al-Bayt (the People of the House), including his descendants known as Imâms, have special spiritual and political power over the community. Unlike other Muslims, the Shî'a believe that 'Ali ibn Abu Tâlib, Muhammad's cousin and husband of his daughter, Fâtima, was the true successor to Muhammad, who was appointed by God as his prophet, and thus reject the legitimacy of the first three *Râshidûn* caliphs.

The Shî'a faith is vast and includes many different groups. There are various Shî'a theological beliefs, schools of jurisprudence, philosophical beliefs and spiritual movements. Shî'a Islam embodies a completely independent system of religious interpretation and political authority in the Muslim world. The Shî'a identity emerged soon after the death of Muhammad, and Shî'a theology was formulated in the second century and the first Shî'a governments and societies were established by the end of the third

¹⁰³ Al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-69, 416-24; Qalqashandi, *Subh 'ûl-A'şâ fi Sina'ah al-Insha*, vol. XIII, pp. 226-28, 248-51; Abdalqahir al-Baghdadi, *Usûl al-Din*, pp. 331-32; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 205-10.

century.

Shī'a is divided into three branches. The largest and most well known is the Twelver (*ithnā 'Ashariyya*) which forms a majority of the population in Iran, Azerbaijan, Bahrain and Iraq. The term Shī'a often refers only to Twelver Shī'a. Other smaller branches include the Ismā'ilī and Zaidī, who dispute the Twelver lineage of Imāms and beliefs.

Shī'a (collective) or Shi'ī (individuals) means follower. "Shī'a" is the short form of the historical phrase *shī'at 'Alī*, which means "the followers of Ali" or "the faction of Ali." Both Shī'a and Sunnī sources trace the term to the years preceding the death of Muhammad.

We can summarize some differences between Shī'a and Sunnī scholars.

1. Shī'a Muslims believe in Twelve Imāms and consider them *ma'sūm* (infallible), like prophets. The Ja'farī Shī'a consider the *Sunnah* to be the oral traditions of Muhammad and their implementation and interpretation by the Imāms who were all scholars and descendants of Muhammad through his daughter Fâtima and her husband, the first Imām 'Ali. That is very important difference. They believe in the *infallibility of the Imāms (ma'sumiyyah)*.

2. Twelver Shī'a Muslims believe that the study of Islamic literature is a continuous process and is necessary for identifying all of God's laws. Sunnī Muslims also believe that they can interpret the Qur'an and *hadīth* with the same authority as their predecessors – that the gate to Ijtihād was never closed. However, the opinions of the 1st- and 2nd-century (7th and 8th century CE) scholars are given greater weight.

3. Traditionally, Twelver Shī'a Muslims consider 'Ali ibn Abu Tâlib and the other 11 Imāms to be not only religious guides but political leaders as well, based on a crucial *hadīth* where the Prophet Muhammad passes on his power to command Muslims to Ali. Since the last Imām, Muhammad al-Mahdi, went into occultation in 939 AD and is not expected back until the end times, this left the Shī'a without a religiously sanctioned government. In general, the Shī'a adhere to one of three approaches to the state: either (i) full participation in government, i.e. attempting to influence policies by becoming active in politics, or (ii) passive cooperation with it, i.e. minimal participation, or (iii) most commonly, the mere toleration of it, i.e. remaining aloof from it. Historically, Zaidī and Ismā'ilī Shī'a Imāms functioned as both religious and political leaders, but after the fall of the Fatimid Empire the Ismā'ilī Imāmate became a religious institution. This changed with the Iranian Revolution, when the Twelver Ayatollah Khomeini and his supporters established a new theory of government for the Islamic Republic of Iran, based on Khomeini's theory of guardianship by the Islamic jurist (*velāyat-i faqīh*) as rule of the Islamic jurist, and jurists as "legatees" of the Prophet Muhammad.

4. Because Islamic law and theology is based partly on *hadîths* (traditions of Muhammad) the Shî'a rejection of some Sunnî *hadîth* and the Sunnî rejection of some Shî'a *hadîths* means that different understandings of Islam emerge.¹⁰⁴

We think that some conflicts can be described as '*amali*' (legal conflicts). They are acceptable. For example, the Shî'a perform ritual prayers (*salâh*) back to back, sometimes worshipping twice consecutively, as in (1+2+2) Asr with *Zuhr*, and '*Ishâ*' with *Maghreb*, respectively. The Shî'a do not perform non-obligatory prayers in the congregation, like *Tarâwih*, which Sunnîs pray during Ramadan. Another difference between the groups is that of *Nikâh Mut'ah* or "temporary marriage." While the Sunnî claim that *mut'ah* is forbidden, the Shî'a accept it because it is found in the Qur'an (An-Nisa, 4:24) and a number of Shî'a traditions in which the practice is permitted. There are Sahîh Shî'a traditions that maintain that *mut'ah* is forbidden, but these are dismissed since they contradict other narrations on *mut'ah* that were deemed more acceptable. Many Shî'a discourage the practice of *mut'ah* but maintain that it is permissible.

Sunnîs and Shî'îs agree on the core fundamentals of Islam – the Five Pillars – and recognize each other as Muslims. In 1959 Sheikh Mahmood Shaltût, Head of the School of Theology at al-Azhar University in Cairo, the most august seat of learning of Sunnî Islam and the oldest university in the world, issued a *fatwâ* (ruling) recognizing the legitimacy of the Ja'farî school of law to which most Shî'as belong. As a point of interest, the Ja'farî school is named after its founder Imâm Ja'far Sâdiq who was a direct descendent, through two different lines, from the Sunnî Caliph Abu Bakr. And al-Azhar University, though now Sunnî, was actually founded by the Shî'a Fatimid dynasty in 969 CE.

However, significant differences between the two Islamic groups remain, and these are what tend to be emphasized. Many Sunnîs would contend that Shî'î seem to take the fundamentals of Islam very much for granted, shoving them into the background and dwelling on the martyrdoms of 'Ali and Hussein. This is best illustrated at '*Ashûra*' when each evening for a period of ten days the Shî'a commemorates the Battle of Karbalâ, with a wailing Imâm whipping the congregation into frenzy of tears and chest beating. It is alleged that instead of missionary work to non-Muslims, the Shî'a harbor a deep-seated disdain of Sunnî Islam and prefer to devote their attention to winning over other Muslims to their group. There is ongoing violent strife between Sunnîs and Shî'î in Pakistan. On the other hand, there has been significant cooperation in recent years between the two groups in Lebanon. And some of the most dynamic developments in Islam today are taking place in Shî'a-dominated Iran.

Iran is overwhelmingly Shî'î – 89%. Shî'î also form a majority of the population in

¹⁰⁴ Al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-69, 416-24.

Yemen and Azerbaijan, Bahrain and 60% of the population of Iraq. There are also sizeable Shī'a communities along the east coast of Saudi Arabia and in Lebanon. The well-known organization Hezbollah, which forced the Israelis out of southern Lebanon in 2000, is Shī'a. Worldwide, Shi'î constitute 10-15% of the overall Muslim population.¹⁰⁵

4.3.2.4 *Jabriyyah*= *Jahmiyyah* (Proponents of Predetermination)

The *Mujabbirah* (also known as *Jabriyyah*) say that "man has no power over any of his actions. He is a tool in the hands of Allah like pen in our hand." This view is known as *jabr* (compulsion). This doctrine was later upheld, with refinements, by the dominant Ash'arî school of theology. Founded by Jahm ibn Safwan (127/745) of Tirmidh in opposition to *al-Qadariyyah* School, this school is sometimes known by the name of its founder as *al-Jahmiyyah*.¹⁰⁶

It adhered to the following principles. *First*, humans are determined in all actions by divine power, including the acts of faith and virtue or lack of faith and vice. They quoted the Qur'anic verses that obviously confirm their thesis, such as 76:29-30 ("But you cannot will, unless Allâh wills. Verily, Allâh is Ever All-Knowing, All-Wise"), and subjected the verses quoted by their adversaries such as 41:40 to allegorical interpretation. They thus reduced Qur'anic freedom to a warning. *Second*, like the *Qadariyyah*, the school sought to preserve divine transcendence through their interpretation of the attributes pertaining to the self of God. They claimed that because only action and creation may be predicated of God, it is legitimate to attribute those qualities to the divine self. *Third*, the transcendence of God precluded that the world be ever visible to humankind. Hence, they interpreted verse 75:22, which says that the blessed shall behold God in Paradise, as meaning only that they will be in His presence. And they denied the eternity of Paradise and Hell because they held that God alone is eternal.

Although nothing definite can be said about the beginnings of *'ilm al-kalâm* among Muslims, what is certain is that discussion of some of the problems of *kalâm*, such as the issue of predestination (*jabr*) and free will (*ikhtiyâr*), and that of divine justice, became current among Muslims during the first half of the second century after Hijrah. The first formal center of such discussions was perhaps the circle of al-Hasan al-Basri (110/728-29). Among the Muslim personalities of the latter half of the first century are Ma'bad al-Juhani (80/ 699) and Ghilan ibn Muslim al-Dimashqi

¹⁰⁵ Al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-69, 416-24; Momen, *An Introduction to Shi'î Islam*; Seyyed Hossein Nasr (trans.), *Shi'ite Islam* (Albany: Suny Press, 1979); Abdulqahir al-Baghdadi, *al-Farq bayn al-Firaq*, pp. 29-72.

¹⁰⁶ Abdulqahir al-Baghdadi, *al-Farq bayn al-Firaq*, p. 211; The Committee, *Mawsû'ah al-Adyân al-Muyassarah*, pp. 195-97, 207-08; *Nash'ah al-Fikr al-Falsafi*, pp. 314-371.

(105/723) who adamantly defended the ideas of free will (*ikhtiyâr*) and human freedom. There were others who opposed them and supported predestination (*jabr*). The believers in free will were called *Qadariyyah* and their opponents were known as *Jabriyyah*.

Gradually, the points of difference between the two groups extended to a series of other issues in theology, physics, sociology and other problems relating to mankind and the Resurrection, of which the problem of *jabr* and *ikhtiyâr* was only one. During this period the *Qadariyyah* came to be called *Mu'tazila* and some of the *Jabriyyah* became *Ashâ'irah*.

This group is comprised of those who deny any wisdom, objective or reason in the worship of Allah. Such people limit worship to merely following Allah's decree, to simply obeying the commandments without attributing any significance to their worship with respect to success and happiness in this world or the hereafter. According to them, Allah did not create the creation for any purpose or wisdom. Created beings cannot cause anything, nor do they have any power or any inherent nature. There is no cause and effect either in the natural world or in the *Sharî'ah* (Law) of Allah. Those things that are forbidden are the same in nature as those that are prescribed; they are forbidden or prescribed not because of their harm or benefit but because of the arbitrary decree of Allah.

Such worship is dry and dreary, devoid of sweetness and spiritual bliss. Their prayers do not cool their eyes. Nor does fulfilling Allah's commandments please their hearts and nourish their bodies. No wonder they refer to their worship as mere *taklîf* (affliction). Many of them even deny the possibility of the love of Allah in the heart of the servant; for, to them, a servant loves Allah's reward and blessings but not the Person (*Zât*) of Allah. Thus they reject the very essence and meaning of Godhood, which lies in His being the ultimate beloved. Worship, indeed, is ultimate love with extreme humility, glorification and reverence.¹⁰⁷

4.3.2.5 The Bâtiniyyah and Qarmathians

Speculative philosophy and theology eventually influenced the *Bâtiniyyah*, though they continued to embrace esoteric knowledge; some Sûfis were also included among the *Bâtiniyyah* for their insistence that there was an esoteric body of doctrine known only to those who had been initiated. Although the Ismâ'ilîs had always acknowledged the validity of both *bâtin* and *zâhir*, around the 12th century this balance

¹⁰⁷ Al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-69, 429-30; Abdulqahir al-Baghdadi, *Usûl al-Dîn*, pp. 333; *al-Farq bayn al-Firaq*, pp. 212-15; The Committee, *Mawsû'ah al-Adyân al-Muyassarah*, pp. 195-97, 207-08.

was upset by the Nusairis (*Nusairiyyah*) and the Druze who accepted only the hidden meanings and exalted the Imâm to extraordinary heights.¹⁰⁸

The Bâtiniyyah movement took its name from the belief that every *zâhir* (apparent state of things) has a *bâtin* (an inner, allegorical, hidden or secret meaning), especially in connection with revelation. Since this movement adopted some aspects of Greek philosophy, such as emanationism, its followers were considered by Sunnî authors to be heretics and outside the pale of faith. During the caliphate of al-Ma'mun (198-281/813-833) the Bâtiniyyah movement was quite strong; about half a century later it was widespread in Iraq, Persia, Sind (western India), and Oman (southeastern Arabia), as well as in North Africa. But its influence was not lasting. It is to be remarked, however, that while a number of individuals in Muslim Spain shared ideas with the Bâtiniyyah, no sectarian or heretical doctrine ever struck roots or succeeded in winning over communities of any size there.¹⁰⁹

So, the second/eighth century witnessed a heavy atmosphere of esoterism influencing some fundamentals of Islam such as the essence of God, the understanding of the Qur'an and the attitude towards the caliphate. Added to this was a trend of viewing opinion as a valid source of jurisprudence on the same level as the Qur'an and the sayings of the Prophet. At the same time, there was also the Mu'tazilîte School that assumed reason to be more decisive in all matters of religion than revelation.

This school of Islamic thought interpreted religious texts exclusively on the basis of hidden rather than literal meanings. Such interpretation gained currency around the 8th century among esoteric Shi'ite schools, especially the schismatic Ismâ'iliyyah, who believed that behind every obvious meaning lay a hidden, true meaning that the Imâm was empowered to interpret. While influenced by speculative philosophy and theology, the Bâtiniyyah remained proponents of esoteric knowledge. Sunnî Muslims condemned the Bâtiniyyah as enemies of Islam for rejecting literal truth and producing confusion and controversy through their multiple textual readings.

Sunnî Muslim scholars condemned the Bâtiniyyah for all interpretations that rejected the literal meaning and accused them of producing confusion and controversy through a multiplicity of readings; this, the Sunnîs alleged, allowed ignorant or mischievous people to claim possession of religious truths and thus deceive those who lacked the knowledge to expose them. The Bâtiniyyah were further labeled by the Sunnîs as enemies of Islam, bent on destroying the Sunnîs' conception of the faith.¹¹⁰

¹⁰⁸ Muhammad Ahmad al-Khatîb, *al-Harakât al-Bâtiniyyeh fi al-Âlam al-Islamî*, (Amman: Matabah al-Aqsâ, 2005, pp. 7-47, 319-431.

¹⁰⁹ The Committee, *Mawsû'ah al-Adyân al-Muyassarah*, pp. 127-28; Philip K. Hitti, *The Origins of the Druze People and Religion*, (Bel Air: BibliBazar, 2007), pp. 49-54.

¹¹⁰ 'Abdulqahir al-Baghdadi, *Usûl al-Din*, pp. 329-31.

The *Qarmatians* (*Qarâmita*: "Those Who Wrote in Small Letters"; also transliterated as "Carmathians", "Qarmathians", "Karmathians" etc.) were a millenarian Ismâ'ilî group centered in eastern Arabia where they established a utopian republic in 899. They are most famous for their revolt against the Abbasid Caliphate and particularly, their seizure of the Black Stone from Mecca and desecration of the Well of Zamzam with Muslim corpses during the *Hajj* season of 930 CE. The Qaramitians were also known as "the greengrocers" (*al-Baqliyyât*) because of their strict vegetarian habits.¹¹¹

In the second half of the ninth century Abdallah ibn Maimun, head of the Qarmatian party, was the founder of this movement. He was a Persian oculist, trained in the school of the Natural Philosophers. He proved able to bring both believers and free-thinkers into a confederacy to attempt the overthrow of the Abbasid government. To the one group he was a conjurer and to the other a pious ascetic or learned philosopher. His colors were white because his religion was that of the pure light to which the soul was to ascend after its earthly wanderings. The duties inculcated were contempt for the body, disregard of the material, community of goods for all the brothers, as well as self surrender to the confederacy, and fidelity and obedience to their chiefs, even to death, for the society had different levels. In accordance with the sequence of existence, viz., God, Reason, Soul, Space and Time, they held that the revelation of God had been made in history and in the constitution of their own brotherhood. The main homes of Qarmatian activity were Basra and Kufa.

In Bahrain and eastern Arabia the Qarmatian state was replaced by the 'Uyûnid dynasty, and it is believed that by the middle of the eleventh century Qarmatian communities in Iraq, Iran and Transoxiana had either been won over by Fatimid proselytizing or had disintegrated. The last mention of the Qarmatians was by w, who visited them in 1050, although ibn Battuta, visiting Qatif in 1331, found it inhabited by Arab tribes whom he described as "extremist Shi'îs" (*rafidiyya ghulât*).¹¹²

4.3.2.6 The *Mushabbihah* and *Mujassimah* (*al-Karrâmiyyah*)

The *Mushabbihah* are those who declare that Allah is like His creation and that the Attributes of Allah are like those of the creation. This was first propagated by Muqâtil ibn Sulayman al-Khurasani during the era of the *tâbi'în*. This group differs from others with respect to its methods of *tashbîh*. It includes the *Musabbihah* of the

¹¹¹ Al-Khatîb, *al-Harakât al-Bâtiniyyeh*, pp. 135-67; *Mawsû'ah al-Adyân al-Muyassarah*, pp. 404-05; Caesar E. Farah, *Islam: Beliefs and Observances*, (Hauppauge: Barron's Educational Series, 2003), pp. 181-82.

¹¹² Mahmud Shakir, *Qarâmita* (Beirut: Dar al-Rashad, 1984), pp. 5-20; Shamsaddîn Muhammad al-Dhahabi, "The Events of 287/803," in *Târîkh al-Islam*, (Beirut: Dâr al-Kitâb al-Arabî, 1997), pp. 29-31.

extreme Shī'a and the *Mushabbihah* of the *Hashawiyah* who said that the Exalted is flesh and blood and possesses bodily limbs. When asked by their companions about this, some of them said "Leave aside the beard and private parts and ask me about anything besides them."¹¹³

The sect of *Karrâmiyyah*, which was founded by Muhammad ibn Karrâm al-Sidjistani (255/869), attracted tens of thousands of people in North Khurasan and Palestine, produced some scholars, was supported by some rulers, and, like many other schools, was annihilated after some centuries of activity. Only their name survived. In some Islamic books some strange and unbelievable various ideas are attributed to them. Such attributions occur both in doctrinal issues like the unity of God, prophet-hood, resurrection, etc. and juristic affairs. Present research is attempting to evaluate one such attribution to Karrâmiyyah concerning the narrative attributes of God, i.e. His having a body, on the basis of their exegeses.¹¹⁴

They held that the Creator – who is exalted above what they say – is spatially extended and particularized upwards. They said that Allah is sitting on the throne in the 'uluw direction (above) and that movement and descent is possible for Him. It has been said (reported about them) that they hold that He fills the throne and they differed on the question if that is the limit or is there something else besides it. They use the word *Jism* (corporal body) with respect to God (*Mujassimah*). The founder of this school is Muhammad ibn Karram who was expelled from Sijistan for heresy. For this reason some scholars call them as *al-Karrâmiyyah*. The *Karrâmiyyah* held God's Word (*Kalâm*) to be *hadîth* (temporal or accidental), yet consider it permissible for a temporal thing to be dependent on divine essence.¹¹⁵

4.3.2.7 *Murji'ah*

Murji'ah holds to the belief of *irjâ'* (the view that sins, major or minor, do not affect faith and that *îmân* (faith) neither increases nor decreases). The first to appeal to this belief was Ghilan ibn Abu Ghilan al-Qadari, who was executed in 105 H. The group claim that actions are not part of faith and that people do not change with respect to

¹¹³ Al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-69, 430-31; Nâsir ibn 'Abd al-Karîm al-'Aql, *al-Firaq al-Kalâmîyah, al-Mushabbihah, al-Ashâ'irah, al-Mâturîdîyah* (Riyâdh: Dâr al-Waṭan, 2001.), pp. 5-25; Abdulqahir al-Baghdadi, *al-Farq bayn al-Firaq*, pp. 225-30; Ali Sâmî al-Nashshâr, *Nash'ah al-Fikr al-Falsafî fi al-Islam*, (Cairo: Dâr al-Ma'ârif, d.n.), pp. 285-93.

¹¹⁴ Abdulqahir al-Baghdadi, *al-Farq bayn al-Firaq*, pp. 215-25; al-Nashshâr, *Nash'ah al-Fikr al-Falsafî*, pp. 297-310; Toshihiko Izutsu, *The Concept of Belief in Islamic Theology*, pp. 187-95.

¹¹⁵ al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-69, 430-31; Nâsir ibn 'Abd al-Karîm al-'Aql, *al-Firaq al-Kalâmîyah, al-Mushabbihah, al-Ashâ'irah, al-Mâturîdîyah*, pp. 5-25; Abdulqahir al-Baghdadi, *al-Farq bayn al-Firaq*, pp. 215-25.

faith and that faith does not increase or decrease.

The *Murji'ah* are divided into the following groups.

(i) Those who say that *îmân* (faith) is merely knowledge (*ma'rifah*), even if this is not accompanied by testing (*tasdîq*). This is the position of the *Jahmiyyah*.

(ii) Those who claim that *îmân* (faith) is merely a verbal affirmation even if the person does not truly believe in his heart. This is the position of the *Karrâmiyyah*. They claim that such people had said the *Shahâdah* once in their lives; what is in their heart does not matter. Ibn Taimiyya included the *Karrâmiyyah* among the *Murji'ah* when he said in his *Fatâwâ*, "The *Karrâmiyyah* are the followers of Muhammad ibn Karrâm who claim that *îmân* is the testing and confirmation of the tongue without the heart."¹¹⁶

(iii) Those who claim that *îmân* is belief (*i'tiqâd*) in the heart and the statement on the tongue but those deeds do not enter into it. They are the lightest of the groups in terms of *irjâ'*.¹¹⁷

4.3.2.8 The *al-Najjâriyyah*

These are followers of al-Husayn ibn Muhammad al-Najjâr. They agreed with *ahl al-sunnah* on *khalq al-af'âl* (creation of deeds for human beings by God), that everything exists only by the will of God and some other faith matters. But they agreed with Mu'tazila on the denial of the knowledge of God, the power of God and other eternal attributes of God and the creation of the Qur'an. They claimed that faith cannot increase or decrease. They include many groups among them, such as al-Barghuthiyyah and Za'faraniyyah.¹¹⁸

4.3.3 *Wahhâbism and Salafism*

As is well known; the *Wahhâbites* call themselves *Salafiyyah* and claim that their objective is to return Islam to its original purity at the time of the Blessed Prophet. The founder of that *madhhab* was Muhammad ibn Abd al-Wahhâb, who came originally from the tribe of Najid and the scholars of the Hanbalîte School. He began disseminating his own *madhhab* at 'Ayniyyah, which was affiliated to Yamamah, the ho-

¹¹⁶ Taqî ad-Dîn Ahmad Ibn Taimiyyah, *Majmû'ah al-Fatâwâ*, vol. 7 (Riyadh: Dar al-Wafa, 1997), p. 548; Toshihiko Izutsu, *The Concept of Belief in Islamic Theology*, pp. 46-7.

¹¹⁷ Al-Sayyid Sharîf al-Jurjani, *Sharh al-Mawâqif*, vol. VIII, pp. 364-69, 428-29; Abdulqahir al-Baghdadi, *al-Farq bayn al-Firaq*, pp. 202-07.

¹¹⁸ 'Abdulqahir al-Baghdadi, *al-Farq bayn al-Firaq*, pp. 207-11; Sarah Stroumsa, *Freethinkers of Medieval Islam: Ibn al-Rawândî, Abû Bakr al-Râzî and Their Impact on Islamic Thought* (Leiden: Brill, 1999), pp. 177-78.

metown of Musailamah al-Kazzâb from 1143/1730 onwards. The Arabs of Najd, who were illiterate and nomadic in all aspects, did not think much at first of the scholar who was one of their own and studied at such educational centers as Damascus and Cairo. In fact, aside from some who had confirmed him, some regarded him as Musailamah al-Kazzâb.¹¹⁹

Muhammad ibn Abd al-Wahhâb, known as the Shaikh of Najd, began to declare that people had been corrupted for six hundred years, that those who were called Muslims were in fact *mushriks* (polytheists), and that therefore their goods and blood were lawful and had to be rejected. In 1766 he applied to Muhammad ibn Su'ûd, Emîr of Najd and Shaikh of Dar'iyah, who had been appointed by the Ottoman State for thirty-nine years. He enticed the Emîr by telling him that he would gain a great sultanate if he abided by his *madhhab* and gave his daughter to him in marriage.

The fundamental beliefs of the Wahhâbites are as follows. It is compulsory to worship Allah directly; accordingly, one cannot appeal to anything as an intermediary (the principle of *Tawhîd*, the Oneness of Allah), according to which those who ask any prophet or a saint of Islam for spiritual aid and those who show respect to tombs through votive offerings, alms and similar methods are all polytheists. While Muhammad ibn Abd al-Wahhâb was writing books to defend his views, he was also sending letters around to communicate his cause. In the meantime, the scholars of Ahl al-Sunnah (moderate Islam) were writing books replying to and rejecting his opinions.

The views the Wahhâbites took with reference to themselves were the *fatwâs* (rulings) by Ibn Taimiyya and ibn al-Qayyim, his pupil, who deviated from the *via media* and went to extremes on some matters. Ibn Taimiyya issued severe judgments against visiting graves, also defending the view that it was by no means permissible to perform ritual prayers at the tombs of either prophets or Muslim saints or to ask for their spiritual assistance. On the other hand, ibn al-Qayyim – in subjection to his master – related in an insistent and strict manner that it was definitely unlawful to visit or butcher animals for sacrifice at graves or to ask for spiritual aid from the dead. In short, against the extreme respect of the public for tombs, both Ibn Taimiyya and ibn al-Qayyim also exaggerated to such an extent that they deemed such practices to be *shirk* (polytheism).¹²⁰

The Shaikh of Najd, Muhammad ibn Abd al-Wahhâb, deviated extremely from the

¹¹⁹ Cf. The Committee, *Mawsû'ah al-Adyân al-Muyassarâh*, p. 496; Natana J. DeLong-Bas, *Wahhâbi Islam: from Revival and Reform to Global jihad*, (Oxford: Oxford University Press, 2004), pp. 7-40..

¹²⁰ Abdul Hamid Siddiqi, "Renaissance in Arabia, Yemen, Iraq, Syria and Lebanon: Muhammad ibn 'Abd al-Wahhab and His Movement," in M.M Sharîf, *A History of Muslim Philosophy*, vol. II, pp. 1446-55; Natana J. DeLong-Bas, *Wahhâbi Islam*, pp. 41-90; Cf. Nasr Abu Zaid, *Reformation of Islamic Thought. A Critical Historical Analysis*, WRR Verkenning no. 10 (Amsterdam: Amsterdam University Press, 2006), p. 18.

right course as regards to those issues and began to declare that such issues as had been deemed unlawful by Ibn Taimiyya and Ibn al-Qayyim in accordance with *Shari'ah*, as acts of total disbelief. They even began declaring that those who refused to regard those who did such acts as disbelievers were themselves disbelievers. As a matter of fact, that same Shaikh of Najd not only accused all those Islamic scholars of all ages of disbelief but also accused a great number of the Companions of Muhammad the Last Prophet of misconduct. Again, that Shaikh of Najd, who claimed to be a *Mujtahid al-Mutlaq* (absolute expounder of Islamic laws) and had the graves of those Companions (*Ashâb*) of the Prophet who had been martyred during the battle fought against Musailamah al-Kazzâb torn down, also claimed – to gain public support – that any tax to be collected from citizens other than *zakâh* (poor dues) would be unlawful. Then when the Emîr of Najd, Muhammad ibn Su'ûd, also professed the Wahhâbite sect in 1745, the Wahhâbite sect turned out to be both religious and political.

As is well known, during the Ottoman State Arabia was governed by native dynasties and local governors called *sheikhs* and *emîrs* as their heads. The western region of Arabia was administered by the Ottoman beglerbegi, who lived in Jeddah, while the eastern region was administered by the beglerbegi of Basra and Baghdad and for a time by the beglerbeg of Lahsa. These governors only coordinated the native Emîrs and sheikhs. But Mecca was governed by administrators called *sharîfs* who definitely came from the generation of the Hâshimîds.

The Ottoman State did not react to the Wahhâbite movement in the first place because their policy was one of complete religious freedom. *First*, they asked for permission to make *hajj* (the major pilgrimage to Mecca); nevertheless, the Meccan scholars studied them, and rejected their demands because their beliefs deviated from mainstream Islam. As a matter of fact, the Ottoman State was not aware of the gravity of the situation. Even some scholars who had risen to the position of *qâdhî 'askar* lacked the ability to perceive the nature of the Wahhâbite movement. In essence, the danger was fully visible, but it did not occur to anybody to take appropriate measures. Even the fact that the Wahhâbites engaged in attacks at times and that the suzerain of Morocco was related to them failed to prove the seriousness of the issue. The counter struggles of the Meccan *sharîfs*, like Sharîf Gâlib, were temporary measures. In fact, in 1798 an agreement was signed between Sharîf Gâlib and 'Abdul Azîz regarding *hajj*. The movements of Sharîf Gâlib against the Wahhâbites in 1790, 1795 and 1798 yielded no noteworthy results. When 'Abdul 'Azîz ibn Su'ûd was at last appointed to replace Emîr Muhammad, the situation changed; and the Wahhâbites managed to establish an independent government in Arabia. Finally, they occupied Hejaz in 1803 and captured Taif and Mecca. Although Sharîf Pasha, the beglerbeg of Hejaz, soon recaptured Mecca, that act led to their recognition in the Islamic World.

In November 1803, 'Abdul 'Azîz died and was replaced by his son Su'ûd ibn al-

Su'ûd, the leader of the Wahhâbites who had been his father's deputy ever since 1787. Unfortunately, because his government grew increasingly stronger, he ruled Medina for seven years from 1805 to 1812 and Mecca for seven years from 1806 to 1813. In July 1805, the Ottoman State appointed Mehmed 'Ali Agha to Mehmed 'Ali Pasha's position, the former promising to exterminate the Wahhâbite movement as the beglerbegi of Egypt. Having solved the Wahhâbite problem when his son Mehmed oghlu Ibrahim Pasha invaded Dar'iyyah in 1830, Mehmed 'Ali Pasha himself rebelled in 1831. In short, the Wahhâbite movement that had in the first place begun as a simple intellectual movement became the official *madhhab* (school) of the Saudi Arabian government during the First World War when the grandchildren of the aforementioned Su'ûdis took the control of the country.¹²¹

Salafism is used in so many different ways that it has become very confusing. The term is used either to identify important characteristics of many Muslim groups that are known by other names or else for some distinct orientations. One of the most commonly accepted ways to use the term is in reference to Wahhabism, although the Wahhâbis themselves employ another term, *Muwahhidîn*.¹²²

When *Salafism* is used as an actual name, it refers to the moderate, modernist reorientation of Islam as defined by the Egyptian *muftî*, Muhammad 'Abduh, early in the 20th century. He used the principle of the pious forefathers, the *salafiyyah*, to create his understanding of Islam in a modern world. He asserted that they represented a rational and practical understanding of the society. On this basis, he claimed that Islam both had the capacity to and was compelled to adjust to modernity. He claimed that *Ijtihâd* (a legal independent judgment based on case law or past precedent) could still be performed. Despite being a moderate of his time, his teachings seem to have been taken up by the founders of *Salafism*, transforming them into a strict and rigid system without the will to compromise.¹²³

This understanding of Salafism involves imitating every aspect of the lives of the first Muslims to a very great extent. Being oriented to asceticism as such, the movement focuses very much on laws and punishments, with the claim that correct actions of an entire society will lead to rewards in terms of safety, stability, welfare and progress.

Understanding the confusing variation of using the term is linked principally to

¹²¹ Ahmed Jawdat Pasha, *Waqâyi' al-Dawlah al-'Aliyyah* (A History By Ahmed Jawdat Pasha) I-XII, (Istanbul: Matba'ah al-Âmirah, 1301/1884), vol. VIII, pp. 282-325; Yilmaz Öztuna, *Osmanlı Devleti Tarihi*, vol. I (Istanbul: Fey Vakfi, 1986), pp. 470-71.

¹²² Cf. Malise Ruthven, *Islam in the World*, (Oxford: Oxford University Press, 2006), pp. 367-70.

¹²³ Osman Amin, "Renaissance in Egypt: Muhammad Abdu and His School," in M.M Sharif, *A History of Muslim Philosophy*, vol. II, pp. 1490-1511.

the different understandings of how and why the earliest Muslims acted. Judging from Muslim sources, they can be interpreted as acting in perfect guidance from God or as acting as normal humans resolving normal problems of society but with first-hand knowledge of divine truth. We will explain below that *salaf-i sâlih* and *salafism* should be distinguished.¹²⁴

4.3.4 *Ahmadiyyah (Qâdhiyaniyyah and Lahoriyyah)*

Ahmadiyyah is a religious movement that was founded toward the end of the 19th century and originated with the life and teachings of Mirza Ghulam Ahmad (1835-1908). The movement is devoted to the revival and peaceful propagation of Islam. Ghulam Ahmad was an important religious figure who claimed to have fulfilled the prophecies about the world reformer of the end times who was to herald the Eschaton as predicted in the traditions of various world religions and bring about the final triumph of Islam. He claimed that he was the *Mujaddid* (divine reformer) of the 14th Islamic century, the promised Messiah (Second Coming of Christ) and the *Mahdi* awaited by the Muslims.¹²⁵

The *Ahmadiyyah* views on certain beliefs in Islam have been controversial to most mainstream Muslims since its birth. A majority of mainstream Muslims do not consider Ahmadîs to be Muslims, citing, in particular, the Ahmadiyyah view of the death and return of Jesus, the Ahmadiyyah concept of *jihâd* and the community's view of the finality of Muhammad's prophethood with special reference to the interpretation of Qur'an 33:40. Ahmadîs, however, consider themselves Muslims and claim to practice Islam. Mirza Ghulam Ahmad founded the movement in 1889 and called it the *Ahmadiyyah Muslim Jamâ'at* (community), envisioning it to be a revitalization of Islam. The Ahmadîs were among the earliest Muslim communities to arrive in Britain and other Western countries.

Ahmadiyyah emerged as a movement within Islam in India over against the Christian and Arya Samaj missionary activity that was widespread in the 19th century. The Ahmadiyyah faith claims to represent the latter-day revival of the religion of Islam.

At the end of the 19th century, Mirza Ghulam Ahmad of Qadian proclaimed himself to be the "Reformer of the Age" (*Mujaddid*), the promised Messiah and the *Mahdî* awaited by the Muslims. He claimed to have fulfilled the prophecy of the return of Jesus. He and his followers claim that his advent was foretold by Muhammad,

¹²⁴ Samir Amghar, Amel Boubekeur, Michaël Emerson, *European Islam: The Challenges for Society and Public Policy*, (Brussel: Center for European Policy Studies, 2007) pp. 38-46; <http://looklex.com/e.o/salafism.htm>.

¹²⁵ The Committee, *Mawsû'ah al-Adyân al-Muyassarâh*, Beirut 2002, Dar al-Nafâ'is, pp. 400-01.

the Prophet of Islam, and by many other religious scriptures of the world as well.

The split in 1914 resulted in the formation of the Ahmadiyyah Muslim Community and the Lahore Ahmadiyyah Movement, also known as *Anjuman Ishâ'at-e-Islam*. The reasons for the split were ideological differences as well as differences regarding the suitability of the elected *Khalîfah* (2nd successor), Mirza Bashîr al-Dîn Mahmud Ahmad (the son of Mirza Ghulam Ahmad). The Lahori Group held that the *Khalîfah* could not be one of Mirza Ghulam Ahmad's family members. But every *Khalîfah* after the first *has* been a family member. The third and fourth *Khalîfah* were his grandsons and the current *Khalîfah* is the great grandson of the founder.¹²⁶

As a result the different claims made by Mirza Ghulam Ahmad his followers broke up into different groups. The first main group consists of those who believe that Mirza Ghulam Ahmad is a prophet. They are called *Qâdhiyaniyyah*. The second group is made up of those who believe that Mirza Ghulam is the promised Messiah and a reformer. They separated from the main group of the Qâdiyânîs after the death of Mirza Ghulam Ahmad. They are known as the Lahori Ahmadîs.

a) *Qâdhiyaniyyah*: The *Ahmadiyyah Muslim Community* believed that Mirza Ghulam Ahmad had indeed been a "non-law bearing" prophet and that mainstream Muslims who rejected his message were guilty of unbelief. The Ahmadiyya Muslim Community, however, maintained that caliphs (successors of Ghulam Ahmad) should continue to be in charge of the community and should be given overall authority. Soon after the death of the first successor to Ghulam Ahmad, the movement split into two groups over the nature of Ghulam Ahmad's prophethood and his succession. The Ahmadiyyah Muslim Community is the larger community of the two, arising from the Ahmadiyyah movement founded in 1889 by Mirza Ghulam Ahmad of Qâdiyan (1835-1908). The original movement split into two factions soon after his death. The Community is led by the *Khalîfah al-Masih* ("successor to the Messiah"), currently Khalîfah al-Masih V, who is the spiritual leader of the Community and the successor to Mirza Ghulam Ahmad.¹²⁷

b) *Lahoriyyah*: The Lahore Ahmadiyyah Movement, however, affirmed the traditional Islamic interpretation that there could be no new prophet after Muhammad and viewed itself as a reform movement within the broader *Ummah*. The question of succession was also an issue in its split from the Ahmadiyyah movement. The Lahore Ahmadiyyah Movement believed that an *anjuman* (body of elected people) should be

¹²⁶ Zahid Aziz, *A Survey of the Lahore Ahmadiyya Movement: History, Beliefs, Aims and Work*, (Wmebly: Ahmadiyya Anjuman Lahore Publications, 2008), pp. 38-42; Simon Ross Valentine, *Islam and the Ahmadiyya Jama'at: History, Belief, Practice*, (New York: Columbia University press, 2008), pp. 31-75.

¹²⁷ Ghulâm Ahmad, *The Philosophy of the Teachings of Islam*, (Surrey: Raqem Press, 1996), pp. 3-23.

in charge of the community. Leaders of the Lahore group include Maulana Muhammad 'Ali, a religious scholar and the first Muslim author of an English language translation of the Qur'an, and Khwaja Kamal-ud-Din as a lawyer, the founder of the Working Muslim Mission in UK, founder of *The Islamic Review*, and companion of Mirza Ghulam Ahmad.¹²⁸

Although the central values of Islam (prayer, charity, fasting, etc.) and the six articles of belief are shared by Muslims and Ahmadis, distinct Ahmadiyyah beliefs include the following.

1. *The rejection of the finality of {Muhammad's} prophethood.* Ahmadis believe that their founder was a prophet of God, that Muhammad was the last lawbearing prophet for humankind, and that the religion of Islam is a perfect religion for humankind. Ahmadis Muslims believe that the door of revelation from God to humans can never be closed.

2. The prophecies concerning the second coming of Jesus were metaphorical in nature and not literal. Mirza Ghulam Ahmad himself had fulfilled these prophecies and was the second coming of Jesus, and the promised *Mahdī* and Messiah.

3. The Qur'an has no abrogated verses, (i.e. no verse of the Qur'an abrogates or contradicts another). All Qur'anic verses have equal validity in keeping with their emphasis on the "unsurpassable beauty and unquestionable validity of the Qur'an." The harmonization of apparently incompatible rulings is resolved through their juridical deflation in Ahmadi *fiqh*, so that a ruling (considered to have applicability only to the specific situation for which it was revealed), is effective not because it was revealed last but because it was most suited to the situation at hand. In this way Ahmadis were able to contend that Qur'an 9:5 (the sword verse) had not abrogated all verses calling for peaceful co-existence with the non-Muslims.

4. The continuation of divine revelation. Although the Qur'an is the final message of God to humankind, He continues to communicate with his chosen individuals in the same way He is believed to have done in the past. All of God's attributes are eternal.

5. That Jesus, contrary to mainstream Islamic belief, was crucified and survived the four hours on the cross. He was later revived in the tomb after having passed out. Ahmadis believe that Jesus died in Kashmir of old age while seeking the lost tribes of Israel. Jesus' remains are believed to be entombed in Kashmir under the name Yuz Asaf. According to Ahmadis, Jesus foretold the coming of Muhammad after him, which Christians have misinterpreted.

6. Jesus Christ did not introduce a new religion or law, i.e. he was not a law bearing prophet but was last in the line of Israelite prophets who, like David, Solomon,

¹²⁸ Zahid Aziz, *A Survey of the Lahore Ahmadiyya Movement*, pp. 6-30.

Jeremiah, Isaiah etc., appeared within the dispensation of Moses.

7. *Jihâd* as force can only be used under exceptional circumstances to protect Muslims from extreme religious persecution.

8. The Messiah and the Imâm *Mahdî* are the same person, and it is through his teachings, influence, his prayers and that of his followers that Islam will defeat the Anti-Christ or *Dajjâl* in a period similar to the time it took for nascent Christianity to rise (300 years). The *Dajjâl's* power will slowly melt away like the melting of snow, heralding the final victory of Islam and the age of peace.

9. The history of religion is cyclical and is renewed every seven millennia. The present cycle from the time of the biblical Adam is split into seven epochs or ages, parallel to the seven days of the week, with periods of light and darkness. Mirza Ghulam Ahmad appeared as the Promised Messiah at the sixth epoch, heralding the seventh and final age of humankind, as a day in the estimation of God is like a thousand years of man's reckoning (Qur'an 22:48). According to Ghulam Ahmad, just as the sixth day of the week is reserved for Jumu'ah (congregational prayers) so his era is destined for a global assembling of humankind in which the world is to unite under one universal religion that, according to him, is Islam.

10. The two Ahmadiyyah groups have varying beliefs regarding the finality of the Prophethood of Muhammad. The Ahmadiyyah Muslim Community believes that Muhammad brought prophethood to perfection and was the last lawbearing prophet and the apex of humankind's spiritual evolution. New prophets can come but they must be subordinate to Muhammad, cannot exceed him in excellence, alter his teaching nor bring any new law or religion. The Lahore Ahmadiyyah Movement believes that Muhammad is the last of the prophets and that no prophet, new or old can come after him.

India has a significant Ahmadiyyah population. The Pakistani parliament has declared Ahmadîs to be non-Muslims and in 1974 the government of Pakistan amended its constitution to define a Muslim "as a person who believes in the finality of the Prophet Muhammad."¹²⁹

4.3.5 *Ismâ'iliyyah and Aga Khan*

Ismâ'ilîs are a sect of Shi'îte Muslims whose reached the height of their influence from the 10th to the 12th century. They emerged out of a dispute in 765 over the succession of Ja'far al-Sâdiq, whom Shi'îtes acknowledged as the sixth Imâm or spiritual successor to Muhammad. The Ismâ'ilîs recognized Ismâ'il, the eldest son of Ja'far, as

¹²⁹ Maulana Muhammad Ali, *The Founder of the Ahmadiyya Movement*; <http://www.ahmadiyya.org/books/f-ahm-mv/ch4.htm>.

his legitimate successor. Upon Ismâ'il's death they acknowledged his son Muhammad to be the seventh and last Imâm, who is expected to return on Judgment Day. The Ismâ'ilîs are also known as Seveners, because they accept only seven Imâms rather than the twelve recognized by other Shi'îtes.¹³⁰

Although Ismâ'ilîs subscribe to basic Islamic doctrines, they also hold to esoteric teachings and corresponding interpretations of the Qur'an. Developed in the 9th and 10th centuries under the influence of Gnosticism and Neoplatonism, they posit the creation of the universe by a process of emanation from God.

In the late 9th century an Ismâ'ilî state was organized according to communistic principles in Iraq by Hamdan Qarmat; his followers became known as Qarmatians. His state soon disintegrated, but some of his followers combined with other Ismâ'ilî groups to form the Fatimid dynasty of North Africa in the 10th century. The Fatimids conquered Egypt in 969 and developed a strong and culturally brilliant state that flourished until the 12th century. During the reign of the Fatimid dynasty the Ismâ'ilîs gradually lost their original revolutionary fervor. A splinter group of Ismâ'ilîs, known to Westerners as the Assassins, established a stronghold in the mountains of northern Iran in the 12th century and carried out terrorist acts of assassination against important religious and political leaders of Sunnî Islam.

Like other Shi'îte traditions, the Ismâ'ilîyah accepts the spiritual authority of the Imâm. However, unlike the mainstream Twelver Shî'as (also known as Imâmiyyah), the Ismâ'ilîs regard Muhammad's [the sixth Imâm] son Ismâ'il as the seventh Imâm and continue the line of Imâms through Isma'il and Muhammad's descendants. (The Twelver Shi'îtes regard Ismâ'il's younger brother, al-Must'alias, as the seventh Imâm and the line of Imâms to continue from him.)

Ismâ'ilî doctrine considers history to be divided into seven periods. Each period begins with a prophet who is then followed by six infallible Imâms. The first six prophets were Adam, Noah, Abraham, Moses, Jesus and Muhammad. Each Imâm was accompanied by an interpreter who taught the secret meaning of the Imâm's teaching to a small circle of initiates. The previous six interpreters were Seth, Shem, Isaac, Aaron, Simon Peter and 'Ali. The six Shî'a Imâms (from al-Hasan to Ismâ'il) followed Muhammad and his interpreter 'Ali. The seventh Imâm Muhammad, did not die but went into hiding, and will appear as the *Mahdî*, inaugurating an era in which the old traditions, including Islam, will become obsolete.

Although the Ismâ'ilîs claimed that they submitted to the basic Islamic pillars, they believe that Islamic Law (the *Shari'ah*) should be repealed. They reject the Qur'an and all forms of prayers in the main Sunnî Islamic tradition. They interpret Islamic

¹³⁰ Al-Khatîb, *al-Harakât al-Bâtiniyyeh*, pp. 55-134.

teachings spiritually, which frees them from adhering to the laws and obligations such as prayer, fasting, and *hajj*.

The two main branches of Ismâ'ilîs today are the Bohras, with its headquarters in Mumbai (formerly Bombay), India, and the Khojas, concentrated in Gujarât State of India. Another subsect, headed by the Aga Khan, has followers in Pakistan, India, Iran, Yemen and East Africa.¹³¹

Aga Khan is the hereditary title of the Imâm of the Nizârî Muslims, the largest branch of the Ismâ'ilî followers of the Shi'ah faith. The Ismâ'ilî branch of Shi'a Islam holds to the Imâmâte of the descendents of Ismâ'il ibn Ja'far, eldest son of Imâm Ja'far al-Sâdiq's eldest son, while the mainstream Twelver branch of Shi'ism follows Ismâ'il's younger brother Musa al-Kâzim and his descendants.

In the 1850s the honorary title of Aga Khan was bestowed on Aga Hasan 'Ali Shah, the 46th Imâm of the Ismâ'ilîs, by Fath 'Ali Shah Qajar, the Shah of Persia. Etymologically, the title combines the Turkish military title Agha, meaning "noble" or "lord," with the Altaic title Khan for a local ruler, so the combination means roughly "Commanding Chief." In Persia's Qajar court protocol, the khan (and Emîr) was usually a commander of armed forces and a provincial tribal leader who ranked fourth among the eight title classes for non-members of the dynasty.

In 1887 the colonial rulers of India, the British Raj, gave the Aga Khan rank and nobility in recognition of his help in suppressing a Muslim rebellion against the British. The Aga Khan was hailed as a great leader by the British and thus became the only religious or community leader in British India who was given a personal gun salute; all other so distinguished were either rulers of princely states or political pensioners who held ancestral princely titles in states abolished by the Raj. Prince Karîm al-Hussainî became the present Aga Khan IV upon assuming the Imâmât of the Nizârî Ismâ'ilîs on July 11, 1957 at the age of 20, succeeding his grandfather, Sir Sultan Muhammad Shah Aga Khan (Aga Khan III).¹³²

4.3.6 *Ibâdhiyyah*

Ibâdhiyyah is a school of thought in Islam and is the dominant sect in Oman. There are Ibâdhîs in Algeria, Tunisia, East Africa, and Libya as well. Believed to be one of the earliest schools, it is said to have been founded less than 50 years after the death of the prophet Muhammad. Some historians think that the group developed

¹³¹ The Committee, *Mawsû'ah al-Adyân al-Muyassarrah* (Beirut: Dar al-Nafâ'is, 2002), pp. 83-84; Ismail Senay, "Isma'iliyyah," <http://www.mb-soft.com/believe/txh/ismâ'ilî.htm> (Accessed 7/7/2009).

¹³² They have a huge network throughout the world and are rich. See <http://www.iis.ac.uk/home.asp?l=en>.

out of the seventh-century Islamic sect known as the Khawârij or Khârijîtes. Nonetheless, Ibâdhîs see themselves as a separate group from the Khawârij. The school derives its name from Abdullah ibn Ibâdh at-Tamîmî. Followers of this sect, however, claim its true founder was Jâbir ibn Zaid al-Azdi from Nizwa in Oman.¹³³

Ibâdhî communities are generally regarded as conservative. For example, the Ibâdhiyyah rejects the practice of *qunût* or supplications while standing in prayer. Sunnî Muslims traditionally regard the *Ibâdhiyyah* as a Khârijîte group, but Ibâdhîs reject this designation. Ibâdhîs regard other Muslims not as *kâfir* (unbelievers) (like most Khârijîte groups did) but as *kuffâr an-ni'mah* (those who deny God's grace), although this attitude has relaxed nowadays.

They believe that the attitude of a true believer to others is expressed in three religious obligations. The first is *walâyah*, friendship and unity with the practicing true believers, and with the Ibâdhî Imâms. The second is *barâ'ah*, dissociation and hostility towards unbelievers and sinners, and those destined for Hell. The third is *wuqûf*, reservation towards those whose status is unclear. Unlike the Khârijîtes, the Ibâdhîs have abandoned the practice of not associating with other Muslims.¹³⁴

4.3.7 Sunnî Theological Schools and Their Views on Fiqh

4.3.7.1 Salaf al-Sâlihîn

We should distinguish two things. *First*, the terms *salaf*, *as-Salaf al-sâlih* or *mutaqaddimûn* are used to express the pure Islamic way of the *Sahâbah*, *Tâbi'în* and *Taba' al-Tâbi'în*. *Second*, *Salafism* is a movement that arose especially in the last two centuries. Unfortunately, the Western scholars sometimes confuse the terms *salaf*, *salafism*, *ahl al-sunnah* and *Sunnî*, especially after 9/11. For this reason we will explain these terms briefly:

a) *Salaf* or *as-Salaf al-sâlih* can be variously translated as “(righteous) predecessors” or “(righteous) ancestors.” In Islam it is generally used to refer to the first three generations of Muslims:

1. *Sahâbah*: The Companions of Muhammad, i.e. those who had met or had seen him while in a state of *îmân* (belief) and died in that state;

2. *Tâbi'în*: The Successors, i.e. those who had met or had seen the *Sahâbah* while in a state of *îmân* and died in that state;

¹³³ Nasser al-Braik, “al-Ibâdhiyyah in the Islamic Political Thought and its Role in State Building,” *al-Ijtihād* (Beirut, 1991): 129 (in Arabic).

¹³⁴ *Mawsû'ah al-Adyân al-Muyassarrah* (Beirut: Dar al-Nafâ'is, 2002), pp. 19-20; Amr Khalifa al-Nami, *al-Ibâdhiyyah* (Sultanate of Oman: Ministry of Awqaf & Religious Affairs), pp. 23-69; see http://www.tawait.com/monthly/Nami_ibadhya/Ibadhia_1.pdf (Accessed 8/7/2009).

3. *Tâba' al-Tâbi'in*: The Successors to the Successors, i.e. those who had met or had seen the *tâbi'in* while in a state of *îmân* and died on that state. In a hadîth (prophetic tradition) Muhammad says of the *salaf*, "*The best people are those living in my generation, then those coming after them, and then those coming after (the second generation).*"¹³⁵ Abu Hanîfa, Rabi'ah al-Ra'y and Imâm Mâlik ibn Anas are included among the *salaf*.¹³⁶

In this sense, following the *salaf* is the way that was laid down in the Qur'an and the *Sunnah*, the very sources of Islam. The Prophet said to his daughter Fâtimah: "*Indeed, I am for you a blessed Salaf.*" When asked about which was the correct and acceptable way of understanding Islam, the Prophet replied by saying: "*The way that I and my companions are one.*"

All of the Sunnî scholars of Islam followed the way of the *salaf* in understanding religion. Early scholars such as Imâm al-Awza'î, who died 157 years after the Prophet's move to Medina, said: "*Be patient on the Sunnah, and stop where the people stopped, and say what they said, and refrain from what they refrained from, and follow the path of your righteous Salaf; for verily, sufficient for you is what was sufficient for them.*"¹³⁷

b) *Salafî*, "predecessors" or "early generations," is a Sunnî Islamic school of thought that takes the pious ancestors (*salaf*) of the patristic period of early Islam as exemplary models. Early usage of the term appears in the book *al-Ansâb* by Abu Sa'd Abd al-Karim al-Sama'ni, who died in the year 562 /1166. *Salafîs* view the first three generations of Muslims, consisting of Muhammad's Companions, and the two succeeding generations after them, the *Tâbi'in* and the *Taba' al-Tâbi'in*, as examples of how Islam should be practiced.¹³⁸

As stated above, Salafism and "Wahhâbism" are often used as synonyms. This is wrong and we should distinguish between *Salaf* or *as-Salaf al-sâlih* and *Salafism*. *Salafism* adherents usually reject this term because it was considered derogatory and because they believe that Muhammad ibn Abd al-Wahhâb did not establish a new school of thought or describe themselves as such. Typically, adherents used terms like "*Muwahhidûn*," "*Ahl al-Hadîth*" or "*Ahl al-Tawhîd*."

Salafism as a new term is a movement like the Sufis. Salafîs can come from the Mâlikî, the Shâfi'î, the Hanbalî, or the Hanafî schools. Salafîs are divided on the ques-

¹³⁵ Al-Bukhari, *al-Jâmi'*, 3:48:819 and 820; Muslim, *al-Jâmi'*, 31:6150 and 6151.

¹³⁶ Cf. B. A. Roberson, (2003), "The Shaping of the Current Islamic Reformation," Barbara Allen Roberson, *Shaping the Current Islamic Reformation*, (New York: Routledge, 2003), pp. 7-8.

¹³⁷ Al-Bukhari, *al-Jâmi'*, Hadith Number: 2652.

¹³⁸ For more information see Elizabeth Sirriyeh, *Sufis and Anti-Sufis: The Defense, Rethinking and Rejection of Sufism in the Modern World* (Surrey: Curzon Press, 1999) pp. 95-98.

tion of adherence to the four recognized schools of legal interpretation (*Madhhabs*).

Salafis must base their jurisprudence directly on the Qu'ran and the *Sunnah* and the first three generations of Muslims. They believe that literal readings of the Qur'an and the *hadith* and the *ijmâ'* (consensus) of the '*ulamâ* constitute sufficient guidance for the believing Muslim. Virtually all Salafis scholars support this position.

Salafis also attribute many of their teachings to the 14th-century Syrian scholar Ibn Taimiyya, and his students ibn al-Qayyim, ibn Kathir and Muhammad ibn Abd-al-Wahhâb in the 18th century.

Some Salafis rely on the jurisprudence of one of the four famous *madhhabs*. For example, Ibn Taimiyya followed the Hanbalî *madhhab*. Some of his students (such as *ibn Kathir* and *al-Dhahabi*) followed the Shafi'î *madhhab*, whereas others (such as ibn Abu al-'Iz) follow the Hanafî *madhhab*. However, none of the *madhhabs* are to be followed blindly, and in some cases Salafis may choose views that differ from any of them.

As we explained concisely, from a perspective widely shared by scholars of Islam, the history of *Salafism* started in Egypt in the mid-19th century among intellectuals at al-Azhar University, the preeminent center of Islamic learning, in Cairo. Prominent among these intellectuals were Muhammad 'Abduh (1849-1905), Jamal al-Dîn al-Afghani (1839-1897) and Rashîd Ridhâ (1865-1935). These early reformers recognized the need for an Islamic revival, noticing the changing fortunes in the Islamic world following the Enlightenment in Europe. Al-Afghani was a political activist, whereas 'Abduh, an educator and head of Egypt's religious law courts, sought gradual social reform and legal reform in order "to make Sharî'ah relevant to modern problems." 'Abduh argued that the early generations of Muslims (the *salaf al-Sâlihîn*, hence the name *Salafiyya*, which is given to 'Abduh and his disciples) had produced a vibrant civilization because they had creatively interpreted the Qur'an and *hadith* to answer the needs of their times.

Many self-described Salafi today point instead to Muhammad ibn Abd-al-Wahhâb as the first person in the modern era to push for a return to the religious practices of the *Salaf al-sâlih* or "righteous predecessors".¹³⁹

4.3.7.2 The Ash'arî School (Ash'arîtes)

The Ash'arî School (*al-ashâ'irah*) is a school of early Muslim theology founded by the theologian Abu al-Hasan al-Ash'arî (324/936). The disciples of the school are known as Ash'arîtes, and the school is also referred to as the Ash'arîte School. Al-

¹³⁹ Elizabeth Sirriyeh, *Sufis and Anti-Sufis*, pp. 95-8.

Ash'arî was born in Basra, Iraq, a descendant of the famous companion of Muhammad and an arbitrator at Siffin for 'Ali ibn Abu Tâlib, Abu Musa al-Ash'arî. He spent the greater part of his life in Baghdad. Although he belonged to a Sunnî family, he became a pupil of the great Mu'tazilîte teacher al-Jubba'l (915) and remained a Mu'tazilîte until he was forty. In 912 he left the Mu'tazilites and became one of its most distinguished opponents, using the philosophical methods he had learned. Al-Ash'arî then spent the remaining years of his life developing his views and composing polemics and arguments against his former Mu'tazilîte colleagues.

Muslims consider him to be the founder of the Ash'arî tradition of *Aqîdah* with followers such as Abu al-Hassan al-Bahili, Abu Bakr al-Baqillani, Imâm al-Haramain Abu al-Ma'âli al-Juwaini, al-Razi and al-Ghazzali and adherents of the Shâfi'î *madhhab* and Sufis. Some Muslims contend, however, that toward the end of his life al-Ash'arî adopted the *Atharî* creed of Ahmad ibn Hanbal, even affirming that Allah "rose above his throne" and possesses a "face" and "hands" as stated in the Qur'an (although not with a face or hands resembling anything in creation). *Al-Ibânah*, one of the last books that he wrote, is especially notable in that here al-Ash'arî accepted the Atharî creed entirely.

The Ash'arî scholar ibn Furak numbers Abu al-Hasan al-Ash'arî's works at 300, but only a handful of these works, in the fields of heresiography and theology, have survived. The three main ones are the following. 1) *Maqâlât al-Islâmiyyîn* comprises not only an account of the Islamic schools but also an examination of problems in *kalâm*, or Islamic theology, and the names and attributes of Allah. The greater part of this work seems to have been completed before his conversion from the Mu'tazilîtes. 2) The second is *Kitâb al-Luma'*. 3) *Kitâb al-Ibânah 'an Usûl al-Dîyânah* is an exposition of the theological views and arguments he developed against Mu'tazilîte doctrines.

In contrast to the Mu'tazilîte school, the Ash'arîte view held that comprehension of unique nature and characteristics of God were beyond human capability and that, while humans had free will, they had no power to create anything. This was a *Taqlîd*-based view that did not assume that human reason could discern morality. A critical spirit of inquiry was far from absent from the Ash'arîte school. Rather, what they lacked was a trust in reason itself, independent of a moral code, to decide what experiments or what knowledge to pursue.¹⁴⁰

4.3.7.2.1 The Main Doctrines of al-Ash'arî

We will list the main doctrines of al-Ash'arî, which are aimed at defending the basic principles of the *Ahl al-Sunnah* or at attempting to justify their beliefs rationally.

¹⁴⁰ Sa'd al-Dîn Mas'ud ibn 'Umar al-Taftâzani, *al-Talwîh li Kashf Haqqâ'iq al-Tanqîh*, vol. I, pp. 375-94.

1. The Divine Attributes, contrary to the belief of the Mu'tazila and the philosophers, are not identical with the Divine Essence; but are also not external to Allah (*lâ 'ayn wa lâ ghair*).
2. The Divine Will is all-embracing. Divine providence and predestination encompass all events (this belief, too, is contrary to the view held by the Mu'tazila, although it is in agreement with those of the philosophers).
3. All evil, like good, is from God (of course, this view is a logical corollary, in al-Ash'arî's view, of the above belief).
4. Humans are not completely free in their acts, which are created by God (this belief, too, in al-Ash'arî's view, follows necessarily from the doctrine of the all-embracing nature of the Divine Will).
5. Acts are not intrinsically good or evil, i.e. the *husn* or *qubh* of deeds is not intrinsic but determined by the *Sharî'ah*. The same is true of justice. What is "just" is determined by the *Sharî'ah*, not by reason (contrary to the belief of the Mu'tazila). This is very important in relation to the source of Islamic law. We will explain this in detail.
6. Grace (*lutf*) and the selection of the best for creation (*al-aslah*) are not incumbent on God (contrary to the belief of the Mu'tazila).
7. The power of human beings over their actions does not precede them (there is no *istitâ'ah qabl al-fi'l*) but is commensurate and concurrent with the acts themselves (contrary to the belief of Muslim philosophers and the Mu'tazila).
8. Absolute deanthropomorphism (*tanzîh mutlaq*), or the absolute absence of similarity between God and creatures does not hold (contrary to the Mu'tazilîte view).
9. The doctrine of acquisition: Human beings do not "create" their own acts; rather they "acquire" or "earn" them (this in justification of the *Ahl al-Sunnah*'s belief in the creation of human acts by God).
10. Possibility of the beatific vision: God will be visible to human eyes on the Day of Resurrection (contrary to the view of the Mu'tazila and the philosophers).
11. The *fâsiq* is a believer (*mu'min*) (contrary to the view of the *Khawârij* who consider him *Kâfir* and contrary to the Mu'tazilîte doctrine of *manzilah bayna al-manzilatayn*).
12. There is nothing wrong if God pardons someone without repentance. Similarly, there is nothing is wrong if God subjects a believer to chastisement (contrary to the Mu'tazilîte position).
13. Intercession (*shafâ'ah*) is justifiable (contrary to the Mu'tazilîte position).
14. It is impossible for God to tell a lie or break a promise.

15. The world is created in time (*hadîth*) (contrary to the view of the philosophers).

16. The Qur'an is pre-eternal (*qadîm*); however, this is true of *al-kalâm al-nafsî* (meaning of the Qur'an), not *al-kalâm al-lafzî* - the spoken word (this in justification of the *Ahl al-Sunnah*'s belief in the pre-eternity of the Qur'an).

17. The Divine Acts do not follow any purpose or aim (contrary to the view of the philosophers and the Mu'tazila).

18. God may impose a duty on a person that is beyond his power (contrary to the belief of the philosophers and the Mu'tazila).¹⁴¹

4.3.7.2.2 *The Problem of Reason and Revelation and the Criterion of Good and Evil*

The Ash'arîtes differ from the Mu'tazilîtes on the question if reason or revelation should be the basis or source of truth and reality: Both schools admit the necessity of reason for the rational understanding of faith, but they differ with regard to the question of which – revelation or reason – is more fundamental and, in case of a conflict, which is to be preferred. The Mu'tazilîtes held that reason is more fundamental than revelation and is to be preferred to revelation. Revelation merely confirms what is accepted by reason and, if there is a conflict between the two, the reason is to be preferred and revelation must be so interpreted as to be in conformity with the dictates of reason.

The Ash'arîtes, on the other hand, held that revelation is more fundamental as the source of ultimate truth and reality and that reason should merely confirm what is given by revelation. The Ash'arîtes prefer revelation to reason if there is a conflict between the two and the reason hundred percent certain. As a matter of fact, this is one of the fundamental principles on which the rational *kalâm* of the Mu'tazilîtes differs from the *ahl al-sunnah kalâm* of the Ash'arîtes. If pure reason is made the sole basis or source of truth and reality, including the truth and reality of the most fundamental principles or concepts on which Islam is based, it would be a pure speculative philosophy or, at best, a rational theology in general and not a doctrinal theology of a particular historical religion, i. e., that of Islam in particular. Islam is based on certain fundamental principles or concepts that, since some of them are suprasensible in nature and are incapable of rational proof. These principles must first be believed in on the basis of revelation. Revelation, thus, is the real basis of the truth and reality of these basic doctrines of Islam. This faith, based on revelation, must be rationalized. As

¹⁴¹ Sa'd-al-Dîn Mas'ud Ibn 'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. I, pp. 375-94; Sharîf, *A History of Muslim Philosophy*, vol. I, pp. 220-43.

a religion no doubt, Islam admits the necessity of seeking rational grounds for its faith. But to admit the necessity of seeking rational grounds for its faith is not to admit pure reason or analytic thought as the sole source or basis of Islam as a religion. No doubt, reason has the right to judge Islam and its basic principles, but what is to be judged is of such a nature that it cannot submit to the judgment of reason except on its own terms. Reason must, therefore, be subordinated to revelation. Its function is to seek rational grounds for faith in the basic principles of Islam and not to question the validity or truth of the principles established on the basis of revelation as embodied in the Qur'an and the *Sunnah*. The problem of the criterion of good and evil follows as a corollary to the problem of reason and revelation. The issue of good and evil is one of the most controversial problems of Islamic theology. The Mu'tazilites held that reason, and not revelation, is the criterion or standard for moral judgment, i.e. of the goodness and badness of an action. The truth and moral value of things and human actions must be determined by reason. They contended that the moral qualities of good and evil are objective; they are inherent in the very nature of things or actions and as such can be known by reason and determined to be good or bad.

In contrast to the Mu'tazilites, the Ash'arites held that revelation and not reason was the real authority or criterion for determining what is good and what is bad. The goodness and badness of actions (*husn wa qubh*) are not qualities inherent to them; these are mere accidents (*'aradh*). Actions – in themselves – are neither good nor bad; rather, it is Divine Law that makes them good or bad. Mu'tazilites state: "Actions and things for which a person is responsible are either, of themselves and in regard to the hereafter, good, and because of this good they were commanded, or they are bad, and because they are bad they were prohibited. That means, from the point of view of reality and the Hereafter, the good and bad in things are dependent on the things themselves and the Divine command and prohibition follows this." According to this school of thought, the following scruple arises in every action which a person performs: "Was my action performed in the good way that it in essence is?" But the Sunnî School, the Ash'arites, say: "Almighty God commands something, and then it becomes good. He prohibits a thing, and then it becomes bad." Therefore, an act is good because it is commanded and bad because it is prohibited.. They look to the awareness of the one who performs the action and establish the act's goodness or badness according to that. And this goodness or badness is not found in the one who looks to this world but in the one who looks to the hereafter.

For example, one could perform prayers or take ablutions while not being aware that there was something that might spoil those prayers and ablutions. If one was completely unaware of it, one's prayers and ablutions would, therefore, be both sound and acceptable. However, the Mu'tazilites say: "In reality it was bad and unsound. It may be acceptable because the individual was ignorant and did not know."

Therefore, according to the Sunnî School, one cannot ask with regard to an act that is in conformity with the externals of the Shari'ah as to whether it was sound?" Rather, one should ask if it was accepted and not become proud and conceited!¹⁴²

To clarify even more the ground of controversy between the Mu'tazilites and the Ash'arites we should understand that there are three senses in which these two terms, good and evil, are used. The first two are the following.

1. Good and evil are sometimes used in the sense of perfection and defect respectively. When we say that a certain thing or action is good or bad (for instance, knowledge is good and ignorance is bad), we mean that it is a quality that makes the possessor of such a quality perfect or implies a defect in him.

2. The terms are also used in a utilitarian sense meaning gain and loss in worldly affairs. Whatever in our experience is useful is good, and the opposite of it is bad. So whatever is neither useful nor harmful is neither good nor bad.

Both the Ash'arites and the Mu'tazilites agree that in the two senses mentioned above reason is the criterion or standard of good and evil. There is no difference of opinion with respect to the above two senses. But good and bad in the second sense may vary from time to time, from individual to individual, and from place to place. In this sense there will be nothing permanently or universally good or bad; what is good to one may be bad to others and *vice versa*. This implies that good and evil are subjective rather than objective and real. Hence, acts are neither good nor bad. Rather experience or workability make them so and, therefore, they can be known by reason without the help of revelation.

3. Good and evil are also used in a third sense of commendable and praiseworthy or condemnable in this world and rewardable or punishable, as the case may be, in the other world.

The Ash'arites maintained that good and evil in this third sense can be known only through revelation, not by reason as the Mu'tazilites held. According to the Ash'arites, revelation alone decides if an action is good or bad. What is commanded by *Shar'* is good, and what is prohibited is bad. *Shar'* can turn that which has been previously declared good into bad and vice versa. Since actions by themselves are neither good nor bad, there is nothing in them that would make them rewardable (good) or punishable (bad). They are made rewardable or punishable through the revelation or *Shar'*. Since there is no quality of good or evil intrinsic to the very nature of an act,

¹⁴² Said Nursi, *The Words*, Twenty-First Word - Second Station, pp. 283-84.

there can be no question of knowing it by reason.¹⁴³

Despite being named after Ash'arî, the most influential work of this school was *Tahâfut al-Phalâsifah* (The Incoherence of the Philosophers), by al-Ghazzali (1111). He laid the groundwork for "shut[ing] the door of *Ijtihâd*" in the subsequent centuries in all Sunnî Muslim states. It is one of the most influential works ever produced. Ibn Rushd (Averroes), a philosopher, famously responded: "[T]o say that philosophers are incoherent is itself to make an incoherent statement." Ibn Rushd's book, *Tahâfut al-Tahâfut* (The Incoherence of the Incoherence), attempted to refute al-Ghazzali's views, even though the latter had not been well received in the Muslim community. His book *The Revival of the Religious Sciences in Islam (Ihyâ 'Ulûm al-Dîn)* was the cornerstone of this school's thought and combined theology, skepticism, mysticism, Islam and other ideas. The important figures of this school include Ibn al-Haytham (1039), al-Biruni (1048), Fakhr al-Dîn Razi (1209) and Ibn Khaldun (1406).¹⁴⁴

4.3.7.3 Mâturidî Theology

4.3.7.3.1 General Information

Muhammad ibn Muhammad ibn Mahmud Abu Mansur al-Samarqandi al-Mâturidî al-Hanafî (333/944) was a Muslim theologian. Born in Mâturid near Samarqand, he was educated in Muslim theology and the juridical sciences. He wrote mostly against other schools, mainly Mu'tazilîs, Qarmatî, and Shî'a. His theology is almost identical to that of the Ash'arîs, and his followers are found chiefly in areas where the Hanafî school is dominant, such as Turkey, Central Asia, Pakistan and India. Imâm Mâturidî's works include *Kitâb al-Tawhîd* (Book of Monotheism); *Radd al-Tahdhîb fi al-Jadal*, another refutation of a Mu'tazilî book; *Kitâb Bayân Awhâm al-Mu'tazila* (Book of the Exposition of the Errors of Mu'tazila).¹⁴⁵

In Islamic history a Mâturidî is one who follows Abu Mansur al-Mâturidî's theology, which is a close variant of the Ash'arî theology (*Aqîdah*). The Mâturidîs, Ash'arîs and Atharîs are all schools of Sunnî Islam, which constitutes the overwhelming majority of Muslims.

The Mâturidîs differ from the Ash'arîs on the questions of the nature of belief and the place of human reason. The Mâturidîs state that belief (*îmân*) does not in-

¹⁴³ Sa'd al-Dîn Mas'ud ibn 'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. I, pp. 375-94; Sharîf, *A History of Muslim Philosophy*, vol. I, p. 220-37.

¹⁴⁴ Abu Hamid al-Ghazzâlî (1058-1111), *Tahâfut al-Falâsifa* (The Incoherence of the Philosophers) (Croydon Park, N.S.W: Adam Publications, 2007); Ibn Rushd, *Tahâfut al-Tahâfut li-Ibn Rushd*, ed. Muhammad al-'Arîf (Beirut: Dar al-Fikhr al-Lunbani, 1993), p. 296.

¹⁴⁵ Nasr, *Islamic Philosophy from its Origin to the Present*, pp. 126-27.

crease or decrease but remains static; it is piety (*taqwâ*) that increases and decreases, whereas the Ash'arîs say that belief does in fact increase and decrease. The Mâturidîs say that the human mind is able to determine that some of the more major sins such as alcohol or murder are evil unaided by revelation. The Ash'arîs say, in contrast, that the unaided human mind is unable to know if something is good or evil, lawful or unlawful, without divine revelation.

Another point on which Ash'arîs and Mâturidîs differ is that concerning divine amnesty for certain non-Muslims in the afterlife. The Ash'arî view stated by Imâm al-Ghazzâlî says that a non-Muslim who was not reached by the message of Islam or was reached by a distorted version of it is not responsible for this in the afterlife. The Mâturidî view states that the existence of God is so obvious that one with intellect and time to think (i.e. not those with intellectual disability, etc.) and was not reached by the message of Islam and does not believe in God will end up in Hell. Divine amnesty is available only to those non-Muslims who believed in God and were not reached by the message.

We can summarize the differences between the two Sunnî schools as follows.

1. One of the principal theological questions with which both schools engaged concerned the role of human reason in religious faith. Unlike the school of al-Ash'arî, which claimed that knowledge of God derives from revelation through the prophets, Mâturidiyyah argues that knowledge of God's existence can be derived through reason alone.

2. Another major issue that concerned both schools was the relationship between human freedom and divine omnipotence. Mâturidiyyah claims that, although humans have free will, God is still omnipotent and in control of history. It is humanity's ability to distinguish between good and evil that makes humans responsible for whatever good or evil actions are performed.

3. Al-Ash'arî held that human reason was incapable of determining what is good and evil and that acts became endowed with good or evil qualities through God's declaring them to be such. Al-Mâturidî takes an opposite position; human reason is capable of determining good and evil, and revelation aids human reason against the sway of human passions.

Reason, according to al-Mâturidî, is the most important of all other sources of knowledge because without its assistance, there can be no real knowledge. Knowledge of metaphysical realities and moral principles is derived from this source. It is reason that distinguishes human beings from animals. Al-Mâturidî pointed out many cases where nothing but reason can reveal the truth. This is why the Qur'an repeatedly enjoins human beings to think, to ponder and to judge through reason in order to find the truth. In refuting the ideas of those who think that reason cannot give true

knowledge, he states that they cannot prove their doctrine without the use of reason.¹⁴⁶

4.3.7.3.2 Reason, Knowledge and Law

Reason, no doubt, occupies a very eminent place in al-Mâturidî's system, but it cannot give, he argued, true knowledge concerning everything we need to know. Like the senses, it has a limit beyond which it cannot go. Sometimes the true nature of the human intellect is dimmed and influenced by internal and external factors such as desires, motives, habits, environment and association and, as a result, it even fails to give us true knowledge of things that are within its own sphere. Divergent views and conflicting ideas of the learned concerning many problems are mentioned by al-Mâturidî as evidence supporting of his statement. Hence, reason often requires, he asserts, the service of a guide and helper who will protect it from straying, lead it to the right path, help it understand delicate and mysterious affairs and know the truth. This guide, according to him, is the divine revelation received by a prophet. If anyone denies the necessity of this divine guidance through revelation and claims that reason alone is capable of giving us all the knowledge we need, then he will certainly overburden his reason and oppress it quite unreasonably.

The necessity of the divine revelation is not restricted, according to al-Mâturidî, to religious affairs only, but its guidance is required in many worldly affairs too. The discovery of the different kinds of foodstuffs, medicines; the invention of arts and crafts, etc., are the results of this divine guidance. The human intellect cannot provide any knowledge about many of these matters, and if humans had to rely solely on individual experience for their knowledge of all these things, then human civilization could not have made such rapid progress. Bearing in mind the verse, "*Nor anything fresh or dry but is [inscribed] in a Record Clear*," (6:59) and supported by the facts that the Qur'an both offers humankind clear statements and evidences, and teaches humankind through signs and indications, we could conclude from the masterly signs and indications of the Qur'an's miraculousness in the stories of the prophets and their miracles that it is encouraging humankind to attain similar achievements. It is as if, with these stories, the Qur'an is pointing to the main lines and final results in the future of humanity's efforts to progress, for the future is built on the foundations of the past, while the past is the mirror of the future. Also, it is as if the Qur'an is clapping humanity on the back, urging and encouraging them, saying: "Exert yourselves to the utmost [and discover] the means to achieve some of these wonders!" It can surely be recognized that it was the source of miracles that first gave humanity the clock and

¹⁴⁶ Sa' d-al-Dîn Mas'ud ibn 'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. I, pp. 405-18; 'Abd-al-'Azîz ibn A. al-Bukhârî, *Kashf al-Asrâr* (Beirut: Dâr al-Kutub al-Ilmiyyah, 1997), vol. I, pp. 272-313; Sharîf, *A History of Muslim Philosophy*, vol. I, pp. 259-71.

the ship.¹⁴⁷

Al-Mâturidî refutes those who think that the individual mind is the basis of knowledge and criterion of truth. He also does not regard inspiration (*ilhâm*) as a source of knowledge. Inspiration, he argues, creates chaos and conflict in the domain of knowledge, makes true knowledge impossible and is ultimately responsible for leading humanity into disintegration and destruction for want of a common standard of judgment and universal basis for agreement.

On the basis of the principle of divine wisdom (*hikmah*) al-Mâturidî tried to reconcile the conflicting views of the Determinists (*Jabrîtes*) and the Mu'tazilîtes, and to prove that human beings have a certain amount of freedom without denying the all-pervading divine will, power, and decree. Wisdom means placing a thing in its own place; so divine wisdom comprises justice (*'adl*) on the one hand and grace and kindness (*fadhîl*) on the other. God possesses absolute power and His absoluteness is not subject to any external laws but only His own wisdom. al-Mâturidî applied this principle also to combat the Mu'tazilîtes' doctrine of *al-aslah* (best) on the one hand and the Sunnî view that God could overburden his servants (*taklîf mâ lâ yutâq*) on the other. It is inconsistent with divine wisdom, which includes both justice and kindness, to demand that humans perform an act that is beyond his power. It is like commanding a blind man to see, or one who has no hands to stretch out his hands.

Similarly, it would be an act of injustice if God would punish believers in hell forever or reward infidels with paradise forever. He agreed with the Mu'tazilîtes on these questions, but he strongly opposed the former's doctrine that God must do what is best for human being. This Mu'tazilîte doctrine, he argues, places God under compulsion to do a particular act at a fixed time for the benefit of an individual and denies His freedom of action. It only proves the right a human being has over God and not the intrinsic value and merit of an action that the divine wisdom keeps in view. Moreover, this doctrine cannot solve the problem of evil. Al-Mâturidî, therefore, maintains that divine justice consists not in doing what is salutary for an individual but doing an action for its own sake and giving something its own place.

The basis of human obligation and responsibility (*taklîf*), al-Mâturidî maintains, does not consist in the possession of the power to create an action but is the freedom to choose (*ikhtiyâr*) and the freedom to acquire an action (*iktisâb*), which freedom is conferred on the human being as a rational being, which make him both responsible and accountable.

It is evident from this brief account that reason and revelation both occupy a

¹⁴⁷ Cf. Bediuzzaman, Said Nursi, *Signs of Miraculousness: The Inimitability of the Qur'an's Conciseness*. Trans. by Shukran Wahide. (Istanbul: Sozler Publications, 2007), pp. 271-75.

prominent place in al-Mâturidî's system. The articles of religious belief are derived, according to him, from revelation, and the function of reason is to understand them correctly. There can be no conflict between reason and revelation if the real purport of the latter is correctly understood. His method of interpreting Scripture may be outlined in the following words: The passages of the Holy Qur'an that appear to be ambiguous or of which the meanings are obscure or uncertain (*mubham* and *mushtabah*) must be taken in light of the verses that are self-explanatory and precise (*muhkam*). Where the apparent sense of a verse contradicts what has been established by the "precise" (*muhkam*) verses, it must then be believed that the apparent sense was never intended, because there cannot be any contradiction in the verses of the Holy Qur'an, as God has repeatedly declared. In such cases, it is permissible to interpret the particular verse in the light of the established truth (*ta'wîl*) or to leave its true meaning to the knowledge of God (*tafwîd*).

The difference between the attitude of al-Mâturidî and that of the Mu'tazilîtes in this respect is quite fundamental. The latter formulated certain doctrines on rational grounds and then tried to support their views by verses from the Holy Qur'an, interpreting them in light of their doctrines. As regards the traditions of the Prophet, their attitude was to accept those that supported their views and to reject those that opposed them.

The doctrines of al-Mâturidî became submerged in the course of time under the expanding popularity of the Ash'arîte School because of the influential activity of the theologian al-Ghazzâlî. This theology is popular where the Hanafî school is followed, viz. in Turkey, Afghanistan, Central Asia, Pakistan, Bangladesh and India. Today nearly 53% of Sunnî Muslims are Hanafîtes, and the majority of Hanafîtes are Mâturidîtes. Mâturidiyyah is now present in Turkey, the Balkans, Central Asia, China, India, Pakistan and Eritrea.¹⁴⁸

¹⁴⁸ Sa'd-al-Dîn Mas'ud ibn 'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. I, pp. 405-18; 'Abd-al-'Azîz ibn A. al-Bukhârî, *Kashf al-Asrâr*, vol. I, pp. 272-313; Sharîf, *A History of Muslim Philosophy*, vol. I, pp. 259-71.

5 THE PERIOD OF ISLAMIC LAW AFTER THE TURKS PROFESSED ISLAM (960-1923)

The Turks, who had led a nomadic life but possessed important legal principles and institutions, became the new supporters of Islamic Law after they became Muslims. We shall here summarize, though briefly, the stages Islamic Law underwent under the influence of the Turks. We will go into actual detail when we look at the related branches of law.

5.1 The Age of Qarakhanids (from 329/940 onward) and the Codification of Theoretical and Applied Islamic Law

The Qarakhanids rescued the Islamic world from invasion by the Qarmatids. They were agreed with Zoroastrianism and were also known as the *Kings of Turkistan*, *al-Afrasyab* or the *First Khans* in Islamic books. They adopted the Hanafî school, which is the largest school of Islamic *fiqh*. On the other hand, with respect to faith, they were followers of Muhammad Mâturidî (333/944), the founder of the *Mâturidiyyah* School, who was one of them. According to the classification of 'Ali Chelebi Qinalizâdah, the following two Turkish jurists enjoy a position that is distinctively different from the others among the first generation of Jurists. One of them is Muhammad Mâturidî, whom we have just mentioned and whom we also discussed in the previous chapter. He also influenced the Jurists of Islam in Baghdad and wrote two noteworthy works on the theoretical law of Islam.¹ The other is Abu al-Fadhl Muhammad al-Hâkim al-Shahîd (334/945), who compiled and summarized the basic works of Imâm Muhammad systematically. Again, this jurist compiled the six books of Imâm Muhammad, known as *Dhakhîra al-Riwâyah*, in his book *al-Kâfî*, which has been annotated by a great number of jurists.²

During the time of the mighty ruler of the Qarakhanids, Bughra Khan (425-448/1033-1056), Abd al-'Azîz ibn Sâlih al-Halwânî (449/1057), who studied law in Bukhâra and was a Turkish jurist to whom all Hanafî jurists referred, merited the title of *Shams al-A'imma* = *The Sun of Imâms*. If we may say so, he was the second Imâm al-A'zam of the Hanafî school and taught hundreds of jurists. In fact, those pupils edu-

¹ Ali Chelebi Qinalizâdah, *Tabaqat al-Mujtahidîn*, SK, manuscript, Baghdad, No. 2172, Doc. 59ff; Tashkopruzadeh, *Miftâh al-Sa'âdah we Misbâh al-Siyâdah*, vol. 2 (Beirut: Dâr al-Kutub al-Ilmiyyah, 1985), pp. 236-58.

² Qinalizâdah, Ali Chelebi, *Tabaqât al-Müjتهidîn*, Sül. Library, Yazma Bağ: No: 2172, Doc. 59ff; Ahmed Akgündüz, Akgündüz, *Mukayeseli İslam ve Osmanlı Hukuku Kuliyâtı*, (Diyarbakır: Dicle University, 1986), p. 24.

cated by the *Madrasah of Halwânî* became the peerless teachers of Hanafî jurisprudence for centuries. According to Qinalizâdah, 'Abd al-'Azîz ibn Sâlih al-Halwânî was Head of the VIII.th generation of Hanafî Jurists. Indeed, the *Madrasah of Halwânî* was at least as important as the *Nizâmiyyah Madrasah*. The contributions of this *madrasah* to the history of Islamic Law could be summarized as follows:

A) Abu Zaid Dabbusi (432/1040), who was born in the city of Dabbus, between Samarkand and Bukhâra, who first studied the abstract rules of Law in form of *Majalla* as Comparative Inter-*Madhhab* Law and wrote a book on the issues called *Ta'sîs al-Nazar*, was actually a student at this *Madrasah*. Islamic jurists called the Comparative Inter-*Madhhab* Law '*Ilm al-Khilâf*' and accepted this eminent person as the founder of the aforesaid science.³

B) Again, Abu al-Laith al-Samarqandi (393/1002), who first compiled the rulings (*fatâwâ*) for such issues (*Wâqi'ât*, events) regarding which no decisive solutions had been narrated by the Imâms of the *madhhabs* and had been solved by the jurists who came later in his work *Kitâb al-Nâwazil*, was one of those educated in that *madrasah*. In fact, this work forms the first nucleus of the series called *Majmû'ah al-Fatâwâ* (*Fatwâ* Magazines).⁴

C) As we mentioned earlier in the chapter on references, the Science of Islamic Law consists of two parts. The first is called *Furû' al-Fiqh*, i.e. Applied Islamic Law; works in this area are systematic works that compile legal decrees. The second is *Usûl al-Fiqh*, which studies theoretical legal issues or, rather, the basic principles on which legal decrees are based, i.e. books on theoretical Islamic Law. The most significant and essential works on both branches of the science of Law were written by the jurists who were educated in that *madrasah*. In fact, the following three basic works on which Hanafî jurists rely in the field of *Usûl al-Fiqh* were produced by that *madrasah*.

1) *The first* is *Taqwîm al-Adillah*, written by Dabbusi in very plain language, is included among our basic references.⁵ 2) *The second* is the two-volume work called *Usûl* (Methodology), written by Shams al-A'immah Muhammad al-Sarakhsi (482/1089) who was born in the city of Sarakhs of Mawarâ' al-Nahr and succeeded his teacher as Head of all the Hanafî Jurists.⁶ 3) *The third* is the work called *Usûl* (Methodology),

³ Halil Edhem, *Duwal-i Islamiye* (Istanbul: Matba'a-i Âmirah, 1927), pp. 179-82; Qinalizâdah, *Tabaqât al-Müjtehidîn*, Doc. 59ff; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

⁴ Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58; Qinalizâdah, *Tabaqât al-Müjtehidîn*, Doc. 65ff; Akgündüz, *Külliyât*, p. 24.

⁵ Qinalizâdah, *Tabaqât al-Müjtehidîn*, Doc. 65ff; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

⁶ Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

written by Fakhr al-Islam 'Ali Pazdawi who was buried in 482/1089 in Samarqand.⁷ Again, the essential works of the Hanafî school in the field of applied law were written in that epoch. The thirty-volume work, *al-Mabsûṭ*, which Sarakhsi had dictated to his students in jail, having been imprisoned because of the harsh advice by the Emîr of Khorasan, ranks among the best of these. This work is a *Mudallal* book on Islamic jurisprudence, annotating the work called *al-Kâfî* by al-Hâkim al-Shahîd. Actually, the examples of works here are too many for the size of this book,⁸ so we will suffice with the examples that have been mentioned above.

In short, during the Age of Qarakhanids, cities in Turkistan such as Semerqand, Kash, Bukhâra and Serakhs were centers of science where the basic principles of the Hanafî *madhhab* were studied in the minutest detail, in which the compliments of Muslim Turkish civil servants to jurists played a great role. The majority of the aforementioned jurists were invested with the capacity for *Ijtihâd* (interpretation). They also mentioned the references for legal decrees in their works. As for the issues on which no legal decrees were found, they performed *Ijtihâd*, faithfully keeping to the basic principles of the Hanafî madhhab. For that reason, jurists such as Sarakhsi and Halwânî were called *mujtahids* in issues. Because of that, all the historians of Islamic legislation consider the Age of Qarakhanids to be the Age of *Mujtahid* Imâms. In turn, the Age of Imitation is said to begin after that period.⁹

5.2 Legal Developments in Other Turkish States before the Ottomans (The Age of Imitation = '*Asr al-Taqlîd*')

5.2.1 Developments in the Seljuqid Period

The Seljuqid period represents a significant era with respect to the aspects not only of Islamic Law but also of Islamic history. On the other hand, the Seljuqids both eliminated the growing danger of Shi'ite Islam and revived the diminishing zeal of the Muslims and routed the Byzantines. The date when the first sultan of the Seljuqids, Tughrul Beg, proclaimed their independence was 432/1040, and that state became famous as the Seljuqids of Khorasan and the Great Seljuqids. The Great Seljuqids, who had lost their previous glory after Sultan Melikshah (485/1092), continued their politi-

⁷ Qınalızâdah, *Tabaqât al-Müjtehidîn*, Doc. 65ff; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58; Abdul Hayy ibn Abdul Halim al-Laknawi al-Ansari, *al-Fawâid al-Bahiyyah Fî Tarâjim al-Hanafiyyah*, (Beirut: Dâr al-Ma'rifah, d.n.), pp. 124-25.

⁸ Seyyid Bey, *Hilâfet ve Hâkimiyet-i Milliye*, (Caliphate and National Sovereignty), (Ankara: d.n.), pp. 66ff.

⁹ Qınalızâdah, *Tabaqât al-Müjtehidîn*, Doc. 59ff; Muhammad Ali Es-Sâyis, *Târîkh 'ul-Fiqh 'il-Islâmî* (Cairo: d.n.), p. 119.

cal existence under various names until the beginning of the 14th century. The sovereignty of the group that was known as *Anatolian Seljuqids* or *Rum Seljuqids*, the capitals of which were Qonya or Sivas passed to the Ottoman State in the course of time. The first founder of that dynasty was Sulaiman the First (470/1077). In the meantime, we should mention the Seljuqids of Damascus and Iraq who were known as *Atabekliks*.¹⁰

During the Seljuqid period, Islamic Law was accepted as the legal system. With certain exceptions, all decrees of Islamic Law were applied in accordance with the views of the Hanafî madhhab. Thanks to the Seljuqid Sultans, the Hanafî madhhab was the main school in Persia, Anatolia and Russia. From the aspect of belief, with some exceptional periods, the Seljuqids supported *Mâturidiyyah*, of the representatives of the Sunnîte *Madhhab*.¹¹

The legal developments in that period could be summarized as follows.

a) Sultan Malikshah (1072-1092), of the rulers of the Great Seljuqids, who led a Sunnîte policy against the Shi'îte and *Bâtinîte* (a school attributing special importance to the interpretation of the hidden meanings of the Holy Qur'an) movements, with political provocation, convened the leading Islamic jurists at the time, also on the recommendation of his vizier Nizâm al-Mulk. He had them prepare a legal code that included clear and decisive decrees concerning certain issues that led to great disputes at the time, in which he demanded that the code that concerned private law in particular be applied in all the countries of the State. Six to seven articles of that code called *al-Masâ'il al-Mâlikshahiyyah Fil Qawâ'id al-Shar'îyyah* are narrated in history books. Again, this work, which we can say was the first official legal code prepared by Muslim Turks in the field of Islamic law, dealt with certain basic matters, clarifying especially fictitious contracts, real estate trading, testifying against women and debtors' falling into arrears to protect Muslims from those who would take advantage of them.¹²

b) The most significant legal progressions in that age were, needless to say, the monumental works left behind by the esteemed vizier of Sultan Melikshah, Nizâm al-Mulk (1485/1092), the first of which, *Siyâsatnâme*, is among the noteworthy references for Seljuqid public law and is also included among our essential references. The second outstanding work of his were those jurists educated at the Nizâmiyyah Madrasah he founded in Baghdad, which Nizâm al-Mulk established not to promote any par-

¹⁰ Khalil Edhem, *Duval-i Islamiye*, (Istanbul: 1327/1909), pp. 208-17; Osman Turan, *Selçuklular Tarihi Ve Türk İslâm Medeniyeti*, (Istanbul: Dergah Publications, 1968), pp.66ff.

¹¹ Najmuddîn Abubakr al-Rawandî, *Rahat al-Sudûr wa Ayat al-Surûr*, (London: 1921), pp. 17-18; Nizâm al-Mulk, *Siyâsatnâme* (Paris: 1891), p. 7; Turan, *Selçuklular Tarihi*, pp.332ff.

¹² The Committee, *al-'Urâdah Fi al-Hikâyah al-Saljuqiyyah*, MTM, vol. 1, pp. 495-96; vol. 2, pp. 249-51.

ticular *madhhab* but to sponsor and improve the sciences. That historical *madrasah* proved to be the place where Shâfi'î and Hanafî jurists negotiated their views and at times went to extremes. Imâm al-Ghazzâlî and his teacher Imâm al-Haramain Abu'l-Ma'âlî occupied the position of Head of the Shâfi'îs. Those Seljuqid sultans who were offended by the declarations of Imâm al-Haramain against Imâm al-A'zam – which was in fact the greatest reason for their lack of reverence for him – turned the love for sciences and law into a symbol. Imâm al-Ghazzâlî, who had insulted Imâm al-A'zam in the first place under the influence of his teacher, made respectful mention of him in all the books he wrote during his period of maturity. The work *al-Mustasfâ* by Imâm al-Ghazzâlî and *al-Burhân* by Imâm al-Haramain were among the basic works on the principles of Islamic law. On the other hand, the three works by al-Ghazzâlî called *Basît*, *Wasît* and *Wajîz* on applied law became the fundamental books for the Shâfi'î law.¹³ Still, Abu Ishaq al-Shirazi, the author of *al-Muhaddhab*, of the most remarkable references for the Shâfi'î *Madhhab*, was a member of that *Madrasah*. Yet al-Mâwardî (450/1057), the writer of the most valuable work on Islamic public law, i.e. *al-Ahkâm al-Sultaniyyah*, was among the most eminent jurists during the Age of Seljuqids, although he was not from that *Madrasah*.¹⁴

c) During the Age of the Seljuqids, the activities of *Ijtihâd* that occurred during the Age of the Qarakhanids ended to a certain extent. As the *madhhabs* became distinct and some were officially accepted by the State, current legal views were preferred to new ones.

The most significant legal activities in that period are as follows:

aa) Jurists, and especially the Hanafî jurists, dedicated their time to the analysis and deduction of the current decrees in the work of Imâm Muhammad. The most noteworthy rivals of the Hanafîs in that field were Shâfi'î jurists.

bb) The legal views narrated from the founders of *Madhhabs* in that period were subjected to certain classification and preference if there were more than one view. The jurists of that period did not do *Ijtihâd* but explained the current views of the former *Mujtahids* and explained narrations that pointed to several probabilities, which Ibn al-Kamal called *Sâhib al-Takhrîj*. Ahmed al-Quduri (428/1037), the author of *al-Mukhtasar*, a legal textbook, and *al-Tajrîd*, on comparative law, and Abu Hafs al-Kabîr of Bukhâra, are among the Turkistani jurists included in this group.

cc) One of the most important activities in that period was that every jurist felt obliged to defend his own *Madhhab* and concentrated on that. Through the insistent inculcations of al-Shâshi, a Shâfi'î jurist of Turkistan, Sultan Mahmud, the son of Sa-

¹³ Turan, *Selçuklular Tarihi*, p. 250ff.; Es-Sâyis, *Târîkh 'ul-Fiqh 'il-Islâmî*, p.119ff; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

¹⁴ Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

buktekin, abandoned the Hanafî madhhab for the Shâfi'î *Madhhab*.¹⁵

Due to all these fluctuations in the fields of belief and law and the disputes in politics, the legal developments in the Age of *Mujtahid* Imâms ceased, and, according to the statements of several legal historians, the Age of Imitation (*taqlîd*) in Islamic law began, in which there was support and development of one of the current schools rather than the establishment of a new legal school. When Baghdad, the center of science in the Islamic World was invaded by the Mongols in 656/1258, the Age of Interregnum began in law as it did in social, economic, cultural and religious issues.¹⁶ However, this should not be understood as the cessation of all scientific activity.

5.2.2 Developments after the Mongol Invasion (656/1258)

5.2.2.1 Characteristics of the Age and Activities Conducted

The Mongol Invasion devastated the Islamic World not only politically but also scientifically and intellectually. Historians of Islamic Law have qualified the period after that invasion as an age of absolute Imitation (*taqlîd-i mahdh*). It is quite remarkable that the Mongols, who first devastated the Islamic World and then became Muslims, did not abandon their former customs and traditions in a very short time and retained decrees that opposed Islamic Law during the first periods. The Ilkhanate, which later became a Muslim state completely, modified the organization of *Tarhan* and *Ulush* (*iqta'*) in accordance with the principles of Islam and thus ensured that it would remain in force. However, despite all these facts, the legal systems of all the Muslim Turkish states were established after the Mongol Invasion and maintained their sovereignty until the foundation of the Ottoman State was again Islamic Law.¹⁷

Accordingly, studies on the Islamic Law should be summarized as follows:

Islamic Law became an established system of law in that period. The jurists of that period duly executed such tasks as compiling the rules of the established law, shortening them as texts of law and annotating them. Furthermore, unlike former periods, significant changes were made in the writing styles of the written legal works. The objective in earlier works was that the legal issues in them be written in the

¹⁵ Muhammad Ali al-Sâ'yis, *Târîkh 'ul-Fiqh 'il-Islâmî*, (Cairo: d.n.), pp. 119-25.

¹⁶ Al-Sâ'yis, *Târîkh 'ul-Fiqh 'il-Islâmî*, pp. 119ff; Abdulkarim Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah* (Baghdad, Matba'ah al-Ânî, 1977), pp. 146-49; al-Khudarî, Muhammad. *Târîkh al-Tashrî' al-Islâmî*, (Cairo: 1390/1970), pp. 275-311; Abdülqâdir Ali Hasan, *Nazratun Âmmah fi Târîkh al-Fiqh al-Islâmî* (Cairo: Dâr al-Kutub al-Hadîsah, 1965), pp. 310ff; Sava Pasha, *Islâm Hukuku Nazariyatı Hakkında Bir Etüd*, Turkish: Baha Arıkan, (Ankara: 1955-56), vol. 1, pp. 107-22.

¹⁷ İbrahim Kafesoğlu, *Türk Millî Kültürü*, (Istanbul: 1983), pp. 341ff; Togan, *Umumî Türk Tarihine Giriş* (Introduction to General Turkish History), (Istanbul: Istanbul University, 1946), pp. 277ff; al-Sâ'yis, *Târîkh 'ul-Fiqh 'il-Islâmî*, p. 126.

clearest and simplest fashion. Now, however, the works written in this period were intended to transform the current comprehensive works into manuals for legislation and chose to summarize them.

In this period 80% of the Islamic legal corpus was probably an exploration, preservation and explanation of the remaining 20%. The hypothesis does not mean undervaluing the creativity or questioning the originality of the classical legal texts. Rather, it merely purports to indicate that what is chiefly believed to be a tradition of Islamic law may alternatively be understood as a tradition of literature transmitting Islamic legal philosophy as a distinguishable part of the discussion.

The complexity, like the genre itself, is multidimensional, and its theological character has to be explored with respect to its significance. A modern reader can easily lose interest and question the priorities of traditional writers. The following remark by Sayyed Qutb is perhaps a good example of this kind of growing unease:

The genre available to us as *Fiqh* may principally be experienced as a literary discourse rather than a legal one. A contemporary mind dwelling into it should understand that classical jurists might not have a sensible and workable corpus of law in their minds all the times. The aim varies according to a particular jurist's inclination, keeping in view the end he wanted to achieve. The purpose is sometimes to produce a concise text for swift committal to memory, a commentary to explicate a condensed text or a super-commentary to elaborate an existing commentary. Rather than getting repulsed by the exorbitant quantity of seemingly outdated written word, it is more objective and feasible for students of knowledge to classify the texts according to their degree of originality and concentrate first on the most original ones for exploration of traditional Islamic law.¹⁸

It is possible to categorize the legal works of that period into four groups.

5.2.2.1.1 Texts (al-Mutûn)

The jurists of this period abbreviated the major legal references written by their predecessors into legal texts and prepared manuals of law. The works prepared according to that tradition, which also continued during the Ottoman State, were actually used by jurists as unofficial legal books in courts and assemblies of *Fatâwâ*. The work called *al-Hidâyah*, which was authored by al-Marghinani (593/1197), one of the eminent jurists of Turkistan, can be regarded as the main source for the aforesaid texts.

¹⁸ Akgunduz and Cin, *Türk Hukuk Tarihi*, vol. I, p. 142; <http://hangingodes.wordpress.com/category/traditional-islam>.

It seems somewhat too complex to discover and disentangle the different layers of these texts, since they covered overlapping periods of history. A cursory analysis alone of any school's (Hanafi, for instance) textual history would reveal that we are dealing with immense amounts of texts with innumerable commentaries, interpretations and elucidations. We could make the effort to analyze the more famous ones by Nasafi, Kasani, Mosali, ibn Nujaim and ibn Abidîn but only to investigate the chains of origins.

We should mention here the following four books as examples from the Hanafi school, which were respected and accepted as *al-Mutûn al-Arba'ah al-Mu'tabarah* (*The Four Authorized Texts*) by all the Turkish Muslim states, including the Ottoman State:

- 1) *al-Mukhtâr* by Majduddîn 'Abdullah (683/1284) from Mosul;
- 2) *al-Wiqâyah* authored by Taj al-Sharî'ah Mahmud (680/1281), a jurist from Turkistan;
- 3) *Majma' al-Bahrain* by ibn al-Sa'âti (694/1294);
- 4) *Kanz al-Daqâ'iq* by Hafiz al-Dîn of Nasaf (710/1310), was among the most recognized legal texts.¹⁹

5.2.2.1.2 Annotations and Exegeses (Shurûh)

Since the above-mentioned texts were not fully understood by everybody, they were annotated by jurists who came after them to explicate them, which, as we stated above were written as *Mudallal* or *Ghair al-Mudallal*. For instance, the *Mudallal* exegesis called *Fath al-Qadîr*, which was written by ibn al-Kamal of Sivas (861/1457) to explain the text of *al-Hidâyah*, and the work *Ghâyah al-Bayân*, written by the Emîr Kâtib al-Itqâni (758/1356) of the City of Farab in Turkistan, may be mentioned as examples.²⁰

We should mention here that the 20% includes four to six juridical works by Muhammad ibn Hasan al-Shaibani, Abu Hanîfa's famous student who recorded his teacher's opinions, decisions and writings which are now extinct. These books are 1) *al-Jâmi' al-Kabîr* 2) *al-Jâmi' al-Saghîr* 3) *Kitâb al-Asl* or *Mabsûl* 4) *Ziyâdât* 5) *al-Siyar al-Kabîr* and 6) *al-Siyar al-Saghîr*. The condensed version of all six works was first prepared by another Hanafi jurist, Hâkim Marwazi, who called it *al-Kâfî fi Furû'u al-Fiqh*. The complete three volumes of *al-Kâfî* were expanded into a thirty-volume commentary by Shams al-Dîn al-Sarakhsi. Burhanuddîn Marghinâni carried out a comparative

¹⁹ Akgündüz, *Külliyât*, pp. 38, 77; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

²⁰ Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

study of Quduri's *Mukhtasar* (a precise text of Hanafi *fiqh* produced long after Shaibani's works) and Shaibani's *al-Jâmi' al-Saghîr*, producing another work called *Hidâyah*

Marghainâni then wrote a sixty-volume exegesis of his own work called *Kifâyah al-Muntahî*. The famous *Hidâyah*, which is still taught as a Hanafî text in most of the religious shools is a condensed readable version of this *Kifâyah*, also prepared by the same author for students. More than 100 years later, an exegesis of *Hidâyah* was written by Muhammad ibn Sadr, known generally as *Wiqâyah*, a condensed explanation of which is still included in the current curriculum.²¹

5.2.2.1.3 Footnotes (Havâshi)

These works aim either to explicate certain matters in annotations written for texts (called *ta'liqât*) or to criticize the views explicated in the annotations. Those works written on annotations as exegesis or criticism are called *hashiyahs* (footnotes). Let us now give some good examples of three types of such works. The Hanafî jurist, Shaikh al-Islam Timurtashi (1004/1595), was inspired particularly by the book *al-Durar wa al-Gurar* authored by Molla Khusraw, which was kind of a text and interpretation, and wrote a legal text called *Tanwîr al-Absâr*. Ala'uddîn al-Khaskafî (1088/1677) explicated that work with his own *al-Durr al-Muhktâr*. Then ibn al-'Âbidin, one of the outstanding jurists of the Ottoman Age (19th century), wrote a *Hashiyah* called *Radd al-Muhtâr*. This example evidences that the tradition of texts, exegesis and footnotes continued during the Ottoman Age as well as prior to it.²²

5.2.2.1.4 Books of Fatâwâ

Books of *fatâwâ* are very important products of this period. Among the books of *fatâwâ* pertaining to that period we should mention in particular *Fatâwâ al-Qâdhîhan*, authored by Fahriddîn Qâdhîhan (592/1196).²³

Since the legal works in that period bore the same characteristics as they did, with certain minute changes, until the fall of the Ottoman State, looking at them from the point of view of the history of Islamic law will be very helpful. Of those jurists in that period who published on the principles of Islamic legislation, the following should be definitely mentioned, according to *Madhhabs*: the Hanafîs included Abu al-Barakah al-Nasafi (710/1310), Zaila'i (743/1342), Kamal ibn al-Humâm (861/1456), 'Ayni (855/1451), ibn al-Nujaim (969/1561); the Mâlikîs included Khalil (776/1374), al-

²¹ See Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 556-59.

²² Akgündüz, *Külliyyât*, p. 39.

²³ Akgündüz, *Külliyyât*, pp. 39, 78-79; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

Hirashi (1101/1689); among the Shâfi'is were Nawawi (676/1277), Subki (683/1284), ibn al-Hajar al-Haithami (909/1503); the Hanbalis included ibn al-Taimiyya (728/1327) and ibn al-Qayyim (751/1350).²⁴

Apart from the studies by jurists mentioned above, some official activities that are significant from the point of view of Islamic law merit our attention also.

5.2.2.2 Contributions of Chagatai Khans and the Babur State to the History of Islamic Law

We need to indicate two legal codes prepared by Muslim jurists that are very important from the point of view of Islamic Law:

A) ***Fatâwâ al-Tatarkhâniyyah***. The *first* are the studies that were carried out during the Chagatai Khanate of the Mongolian states. That area, the majority of whose subjects and public officers were Turkish although its administrators were Mongolians, became a Muslim state during the reign of Sultan Ala'addîn Tarmashirin (722/1322). The jurists of Islam, who were supported by the state, wrote quite valuable works in a very short time. Still, the jurists of that state accepted the Hanafî madhhab as the official *madhhab* of the state as did the states of Altınordu and Ilkhanids that had professed Islam earlier.²⁵

The Mongols, who were known in the Islamic world as Tatars, had the latter name inscribed in gold in history by preparing a very famous code of Islamic Law. Tatarkhan was a nobleman at the court of Muhammad II. Tughlak (Tughluk Timur Khan, 726-752/1324-1351), of the Chagatai Khanate, invited an eminent Turkish jurist named 'Âlim ibn 'Alâ al-Hanafî to the palace and ordered him to prepare a code of Islamic Law that would include all the legal issues. That jurist then prepared the 3000-plus-page collection of laws that became known as *Fatâwâ al-Tatarkhâniyyah*. That work, which was not given a title since it was dedicated to Tatarkhan, was mentioned by that title in the history of Islamic Law. This work, which was a systematic law book, differs from the usual books on *Fatâwâ*. Aside from exceptional issues, to which we will later refer, this work shows that Islamic Law was implemented fully in the Turkish states of Mongolian origin as well.²⁶

B) ***Fatâwâ al-'Âlemgiriyyah***. The *second* noteworthy legal activity to be mentioned here is the Islamic legislative code that was prepared under the sponsorship of the state during the Islamic state known as the Babur State or the Indian Mongols.

²⁴ Akgündüz, *Külliyyât*, pp. 39, 78-79; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

²⁵ Edhem, *Duval-i Islamiye*, pp. 377ff.

²⁶ *Istanbul Müftülüğü Yazma Eserler Bölümü* (Muftî's Office of Istanbul, Chamber of Manuscripts), Alim ibn Alâ, *Fatâwâ al-Tatarkhâniyyah*, vol. I, Doc. I-2; Akgündüz, *Külliyyât*, pp. 36-37.

Sultan Muhyi-al-Dîn Avrangzib 'Âlemgir (1658-1707) of that state in India attributed great importance to science and law and initiated noteworthy attempts to codify the whole of Islamic law. In fact, this great codification of Islamic law known as *Fatâwâ al-Hindiyyah*, *Fatâwâ al-'Âlemgiriyyah* or *Fatâwâ al-Jihangiriyyah*, which took the views of Hanafî school as its basis, was prepared by a Commission by order of the sultan. This work was compiled by a commission under the chairmanship of Sheikh Nizâm of Burhanpur (1679) in association with four assistants of his, Sheikh Wajihuddin, Sheikh Jalaluddin Muhammad, Qâdhî Muhammad Hussain and Molla Hamid, each of whom worked with a team made up of ten jurists. The sultan spent a total of 200,000 rubles (1 ruble = between 60-70 cents) for this compilation. The work consists of 52 books, 515 chapters, hundreds of sections and 6 volumes. Priority was given to the definite and reliable views narrated from Abu Hanîfa (*Zâhir al-Riwâyah*), and if no judgment was found there, narrations were also made from other sources. The legal decrees were given along with the original texts in the references from which they were taken, including the names of references, while the views of the other *Madhhabs* were ignored. This work, which was the most important reference in the implementation of Islamic law in India until English rule, was reprinted many times and was translated into several languages.²⁷

Although the legal activities carried out in these states are not restricted to these, we have mentioned these two because they influenced Ottoman legislation.

5.2.3 Legal Developments in Dhulqâdirids, Aqqoyunids and Other Muslim Turkish States

The Ottoman period was the longest of Turkish Islamic history. Nevertheless, this does not signify that there were no important legal developments in other Turkish states. Our conclusions differ from those reached by some other researchers. The legal activities during the first period of the Ilkhanids look the same from all points of view. The tradition of codification in the Ottoman State was not particular to this state, for the same tradition existed in the other Turkish states as well. Since Muslim Turkish states did not stop at anything with respect to the protection of rights, they not only applied the books of Islamic jurisprudence, which form the basis of Islamic Law, as an official legal code but also used the limited legislative power granted by Islamic Law to *Ulu al-Amr* (the rulers) and carried out certain organizational tasks. Since the foundation was the same, the legal arrangement prepared by an earlier

²⁷ The Committee, *Al-Fatâwâ al-Hindiyyah* (Beirut: 1400/1980), vol. I, pp. 2-3, 574-76; Ali Himmet Berki, *İslâm Türk Ansiklopedisi* (Islamic Turkish Encyclopedia), vol. I, p. 277; J. Schacht, *Introduction to Islamic Law* (Oxford: Clarendon, 1986), p. 249; Akgündüz, *Külliyât*, pp. 40, 70ff; Edhem, *Duwal-i Islamiye*, pp. 498-509.

state was applied by the latter Muslim Turkish state with very few amendments. Because we will elaborate upon this issue in detail later, we will only supply certain historical information here.²⁸

Historical research shows that the studies of Islamic jurists continued in the Age of Principalities (*'asr tawâ'if al-mulûk*) as well with regard to Islamic Law, resulting in texts, annotations, footnotes and *fatwâs*. Moreover, we can see that some codifications were legislated and implemented on the basis of hollow legislative power. We can illuminate this matter by citing two significant examples of this.

5.2.3.1 The Codification (*Qânûnnâme*) of Ala'uddawlah Beg

First, there are the Codifications of the Principality of Dhulqâdirids, a dynasty that ruled the area around the cities of Marash, Malatya and al-'Aziz for 190 years between 740-928/1339-1521. One of the codifications, which were transferred into the Title Deed Registry Books (*Tapu-Tahrîr Defterleri*) written during the reign of Sultan Sulaiman the Lawmaker exactly as they were without any change and which remained in force for a long time during the Ottoman period, was prepared during the reign of the Dhulqâdhî rid Beg 'Ala'uddawlah Beg (884-921/1479-1515) and became famous as the Codification (*Qânûnnâme*) of Ala'uddawlah Beg. It was composed of 51 Articles and consisted of provisions rather than criminal law.²⁹

This codification preserved such Sharî'ah penalties like cutting off hands (*qat' al-yad*), stoning (*rajm*), retaliation (*qisâs*) and the like exactly. Again, the penalties (politics) were determined case by case if the required conditions for executing such a punishment were not met. In other words, it had the qualities of a legal organization of the offences and *Ta'zîr* penalties. Moreover, this codification included provisions related to price-fixing and certain taxes, which concerned finance law. As an example of the provisions found in the said Codification, we will quote Article-10, which is related to the offence of adultery: "If one commits the crime of adultery and this is decided by Sharî'ah or Customary law, and if one is an adult and if no had punishment is implemented, thirteen gold coins shall be taken as *ta'zîr*. If one is married and is not stoned, fifteen gold coins shall be taken." Close study will reveal that this codification deter-

²⁸ *Fâtih Qânûnnâmesi* (Codification of Muhammad the Conqueror); Serkiz Karakoç, *Kulliyât al-Qavânin* (Collection of Codifications), File 1, "Atam, dedem kanunudur" (These are the codes of my ancestors) in TTK Library.

²⁹ PA (*Başbakanlık Osmanlı Arşivi*) *Tapu Tahrîr Defteri* (Prime Ministerial Ottoman Archives Title Deed Registry Book), No. 735 (hereafter BOA); Edhem, *Duval-i Islamiye*, pp. 308-12; Ömer Lütfi Barkan, *XV. ve XVI. Asırlarda Osmanlı İmparatorluğunda Ziraî Ekonominin Hukukî ve Malî Esasları* (Legal and Financial Principles of Agricultural Economy in Ottoman Empire in the XVth and XVIth Centuries) (Istanbul: İstanbul Üniversitesi Edebiyat Fakültesi Yayınları, 1945), pp. 119-24.

mines the *Ta'zîr* penalties, if the penalties determined by Islamic Law are not implemented.³⁰ Again, it is understood that the Code, which ends with the statement, "Those that oppose the provision of this Code are guilty and deserve punishment. Let them know this," was officially binding.³¹

Again, another codification found in the same Title Deed Registry and known as the *Bozoq Codification* belongs to the Age of the Dhulqâdirids. This codification, which consists of provisions concerning theft, forestallment, adultery and similar offences against chastity (*'irdh*), offences committed against individuals and the related indemnities (ransoms and fines), the responsibilities of government officials and tax law, also summarizes the decrees of Islamic Law related to these matters and introduces certain regulatory decrees based on the power vested in the *Ulu al-Amr* (rulers) by *Shar' al-Sharîf*. In fact, this codification is in such a form that those empty sections of the related chapters of the books of Islamic jurisprudence were filled in with this.³² The *Bozoq Codification* contains fifty-seven articles.

5.2.3.2 Legal Codes of Padishah Hasan (*Qânûnnâme-i Hasan Pasha*)

Again the Aqqoyunids state, the capital of which was first Diyarbakir and then Tebriz between 806-914/1403-1508, had certain codifications that were of great importance for the history of Islamic law, and are found in Ottoman archives. These legal arrangements that pertain to the Age of the Aqqoyunid state became famous as the Codes of Padishah Hasan or Hasan Pasha, in reference to the famous sultan of that state, Uzun Hasan (882/1478). These codifications, the originals of which are found in the Title-Deed Registry Books in the Prime Ministerial Ottoman Archives, remained in force for a long time in the Ottoman State as well. The subjects of the codifications, which were known by the names of places like Âmid (Diyarbakir), Mardin, Si'ird, 'Arabgir, Çüngüş, Çermik, Ergani, Hasankeyf and the like – unlike the codifications of the Dhulqâdirids – were decrees related to finance law and the administrative law. The majority of the types of taxes mentioned were also adopted in Ottoman tax law precisely as they were found. As reflections of the customs and orders that had been executed by the principalities of Asia Minor and were also preserved by the Ottoman

³⁰ PA, *Tapu-Tahrîr Defteri*, No. 735.

³¹ PA, *Tapu-Tahrîr Defteri*, No. 735; Akgunduz, *Osmanlı Qanunnameleri*, vol. III, p. 215-83; Barkan, *Qânûnlar*, p. 124.

³² PA, *Tapu-Tahrîr Defteri*, No. 735; *Tapu-Kadastro Genel Müdürlüğü Arşivi* (Title-Deed Cadastre General Directorate Archives), Defter No. 101 (dated 970); Akgunduz, *Osmanlı Qanunnameleri*, vol. III, p. 215-83; Barkan, *Qânûnlar*, pp. 124-29.

State for a long time, these codifications are of great significance.³³

It was actually no different in Muslim Turkish states other than those mentioned above. The Tolunids, whose capital was Egypt, the Ayyubids and the Mamlukids also took Islamic law as their basis to which they made every effort to improve. On the other hand, the academic center of the Muslim states established in Egypt was the *Madrasah of Azhar*, which had from time immemorial taught the sciences and law in Cairo. In fact, this *Madrasah* was an academic center where all kinds of legal affairs were negotiated and where Shâfi'î and Hanafî jurists held discussions at times. Of the jurists who were educated during the age of the Ayyubids, who supported sciences and scholars, (569-650/1174-1252), we should mention in particular the Turkistani Hanafî jurists 'Alâ'addîn and Fâtimah Kashanî (who merited the title of the most distinct jurist of the time because of his work *Badâyi' al-Sanâyi'*), Imâm Nawawî, Shâfi'î jurist, (676-1277); and ibn al-Qudamah, Hanbeli jurist, (620/1223). The statesmen of the Ayyubid state, who themselves preferred the Hanafî madhhab, also referred to the views of the other *madhhabs* whenever public interest so required.³⁴

The political sovereigns of the Azhar *madrasah* after the Ayyubids were the Mamlukids. The Mamlukids, who preferred the Hanafî madhhab, also respected the other *madhhabs*. In fact, we see that Zâhir Baybars, a mighty sultan of the Mamlukids (648-792/1250-1390), appointed four *Sheikhulislam* from four different *madhhabs*, and formed academic commissions made up of those *Sheikhulislams* and other eminent jurists to advise on disputable issues. On the other hand, that method of quadripartite appointment with Hanafî, Shâfi'î, Hanbeli and Mâlikî *Qâdhîs* continued, with some failures, during the time of the Circassian Mamlukids and even during the Ottoman period. It will suffice here to give only the names of some of those scholars who contributed to law to a considerable degree during the Mamlukids period, also guiding the statesmen of the time: Akmaluddîn Babertî of Bayburt, who often traveled to Istanbul (886/1484); ibn al-Humâm of Sivas, regarded as a *Mujtahid* (861/1457); ibn al-Shihnah, the Hanafî *Qâdhî* of Qansu Ghawri; Mahmud 'Aynî of Aynâtâb (855/1451); the Shâfi'î jurists Zarkashi, Zakariyyah al-Ansari and ibn al-Hajar al-Haithami.³⁵

Having thus outlined the legal developments in states other than the Ottoman, we will now glance briefly at the legal developments during the period of the Ottoman State, with the provision that detailed information will be given in the related sections.

³³ PA, *Tapu Tahrîr Defteri* (Title Deed Registry Book), Nos. 64 (840), 558, 735; Barkan, *Qânûnlar*, pp. 130-80; Edhem, *Duval-i Islamiye*, pp. 407-12; Akgunduz and Jin, *Türk Hukuk Tarihi*, pp. 145-8.

³⁴ Edhem, *Duval-i Islamiye*, pp. 88-97.

³⁵ For some historical information see Edhem, *Duval-i Islamiye*, pp. 107-18.

5.2.4 Legal Developments in Ottoman State (1299-1926)

Our purpose here is to outline the course of legal development from the beginning in the Ottoman Period. In a sense the main topic will be introduced here. In order to be able to give historical information about this era, the Ottoman State can be divided into two periods.

5.2.4.1 Legal Developments until the *Tanzîmât* Reforms (699-1255/1299-1839)

5.2.4.1.1 General Information

Before the proclamation of the Imperial Decree of Reform of 1839 (*Khatt-i Sharîf* of Gulkhane), there were different aspects to the legal system of Ottoman State: *First*, there were principles of private law, or rules of civil law which in turn taken completely from Hanafi *fiqh*. The necessity of abiding by these principles was stressed in a special decree sent by Saljuk ruler Alâ'addin to the founder of the Ottoman state, Osman I, which conferred upon him due authority and power and acknowledged his independence. According to this letter-patent, the administrative law was to remain in the hands of the existing judges, thus insuring that the sharî'ah law remains the law of the principality. Thus, in matters concerning personal law, family law, inheritance, contracts, real estate laws, the principles of *fiqh* were observed and enforced. In penal law, the rules of *fiqh* pertaining *al-'uqûbât* (crimes and punishments) were applied in cases of *hudûd* and *jinâyât*. But in ta'zîr crimes and penalties, the authority was given to *ulu al-amr* (state authorities and judges).³⁶

Since it was an Islamic state, the Ottoman State also began to implement the decrees of Islamic Law from the very first years of its foundation. As a matter of fact, the first state officials appointed by 'Uthman Beg were *Qâdhîs* and *subashis* who were vested with the authority to execute the judgments decreed by *Qâdhîs*.³⁷

Although Islamic law became the official legal system of the Ottoman State, it was influenced to a certain extent by the particular features of such a large state. That influence has been interpreted in different ways. According to some, the Ottoman State applied the decrees of Islamic Law only in certain branches of private law in a

³⁶ Abu al-Ula Mardin, "Development of the Sharia under the Ottoman Empire," Majid Khadduri and Herbert J. Liebesny, *Origin and Development of Islamic Law; Law in the Middle East*, (Clark: The Lawbook Exchange, Ltd., 2008), pp. 279-80.

³⁷ Osman Nuri Ergin, *Majalla-i Umur-i Baladiyyah* (Istanbul: 1922), vol. I, pp. 265ff; cf. Ebulula Mardin, "Development of the Sharia under the Ottoman Empire," pp. 279-84.

symbolic fashion, while following customary law in other fields, which meant the sultan's will. Yet, according to others, Islamic Law was abandoned in the field of public law especially, or rather, since no suitable decrees were found in the books of Islamic jurisprudence in that field, the customary law was applied.³⁸

In our opinion, none of these options reflects the precise truth, and those who hold these opinions cannot base those views on archival documents. The Ottoman state did not follow a different path from other Muslim states in implementing Islamic Law. In those fields where Islamic Law decreed clear judgments, applications were based on Hanafî views in books of Islamic *fiqh*. Leaving aside the application of any opinion against Islamic law, they even bound the implementation of such views against the Hanafî *madhhab* to very strict formal conditions. Nevertheless, in those fields where Islamic Law attributed limited legislative power to superior authorities and officials (*ulu al-amr*), they followed certain legislative formalities and thus determined the laws, which were also known as customary law. They looked to the “*affairs of the servants of Allah upon the basis of Sharî‘ah and Laws*” and settled all the legal disputes in reference to the “*Holy Sharî‘ah and the Blessed Decrees of Laws*.”³⁹ Since we will study the details of the subject comprehensively in the section on public law, here we will only make brief reference to certain historical developments.

In our view, the most noteworthy features of Islamic Law in that period are the following.

a) The method of teaching *fiqh*, viz. Islamic Law, and settling legal disputes on that basis which had also been followed by the earlier Turkish Muslim states, continued to be applied as it had been before. Again, the major references of the courts (*Qâdhîs*) as law were the books on *fiqh* (Islamic law). The *Qâdhîs* were chosen from those who had been educated at *madrasahs* and were well versed in *fiqh*. Moreover, eminent scholars of Islamic law were appointed to the Office of *Qâdhî ‘askar*, to which the Ottoman State appointed *Qâdhîs* for a long time. For that reason, the method of studying books on Islamic jurisprudence like texts, annotations and footnotes continued in the same way as it had. The text *al-Ghurar*, written by Molla Khusraw (885/1480) a jurist during the time of Muhammad the Conqueror, and his work *al-Durar*, which interpreted the former, were used at court as manuals. On the other hand, the legal text *Multaqâ al-Abhur* by Ibrahim al-Halebi, one of the Imâms of the Fâtih Mosque, and a book called *Majma‘ al-Anhur* by Shaikh al-Islam Abdurrahman

³⁸ Barkan, *Qânûnlar*, pp. iv-xxv.

³⁹ *Tawqî‘i Abdurrahman Pasha Qânûnnâmesi* (Codes of Tawkiî Abdurrahman Pasha) MTM, vol. I, pp. 498-500; cf. Barkan, *Qânûnlar*, pp. IXff; Ergin, *Majalla-i Umur*, vol. I, pp. 273ff.; Kafesoglu, *Türk Millî Kültürü*, pp. 346ff; *İlmiye Salnâmesi*, (Istanbul: Mashikhat-i Islamiye, 1334/1916), pp. 316ff.

(Dâmâd) Effendi, as an exegesis of the former, are examples of this type of book.⁴⁰

As a matter of fact, the latter text, i.e. *Multaqâ al-Abhur*, was accepted as the official legal code of the Ottoman State by the imperial edicts issued in 1648 and 1687.⁴¹

b) The codification of *fiqh* during the Ottoman period passed to another field. Since there were a sufficient number of systematic books on Islamic jurisprudence, the Ottoman jurists occupied themselves with the codification of books of *Fatâwâ* in which legal answers were compiled in response to questions submitted rather than with systematic *fiqh* books. Although examples of these had existed previously, books on *Fatâwâ* increased in number to a remarkable degree during the Ottoman period and had the function now assumed by decrees on application by the Supreme Court. Accordingly, every jurist who was appointed to the official position of *Fatâwâ* or actually executed important judicial offices compiled their *Fatâwâ* as special books according to the system of *fiqh* books. The method of *Fatâwâ* books, which also consisted of decrees for legal issues for which no solution had been given in books of *fiqh*, is generally that of a catechism. In most of them those legal texts that serve as the legal bases for *Fatâwâ* are provided. Some journals on *Fatâwâ* such as the *Fatâwâ* of Abu al-Su'ûd Effendi and Abdurrahim (Menteshizade) Effendi remain the most significant references for Islamic law today.⁴²

c) Another noteworthy feature of that period is that the *Dîwân al-Humâyûn* (the Imperial Council) and the *Padishah*, who functioned as *Ulu al-Amr* (Rulers), implemented certain important legal arrangements in certain areas under the name of *Qânûnnâme* (legal code) with the legislative power vested in them by Islamic Law. Actually, some weak views of Islamic Law falling under the authority of the authorized party, i.e. the *Wali al-Amr* (caliph, president, etc.), such as restricting certain *Shari'ah* decrees and implementation, were preferred and applied – if necessitated by the public good – thus turning a weak view into a strong view through the preference of the authorized party. As a matter of fact, the principle those certain legal decrees may change with time points to this type of decree. Moreover, when the *Ulu al-Amr*, viz. the ruler, issued an order regarding an issue of *Ijtihâd* (opinion), in other words on a matter that was not overtly against the established decrees of *Shari'ah*, it was adopted in Islamic Law as a principle that was to be obeyed like a law. The Majalla has explained this principle as below:

⁴⁰ The Committee, *İlmiye Salnâmesi*, pp. 308ff.

⁴¹ PA, *Ottoman Archives*, YEE-14-1540, p. 14.

⁴² The Committee, *İlmiye Salnâmesi*, pp. 314ff; Barkan, *Qânûnlar*, pp. XXXIVff; Mustafa Ahmed Zarkâ, *Al-Fiqh al-Islamî Fi Sawbih al-Jadid*, vol. I (Dimashq: Dâr al-Kutub, 1964), pp. 201-02.

1801. The jurisdiction and powers of the judge are limited by time and place and certain matters of exception.

If an order is issued by the sovereign authority, those actions relating to a particular matter shall not be heard in the public interest; the judge may not try such action. Action, the judge may be authorized to hear certain matters only in a particular court and no other. The judge may try only those cases he is authorized to hear and judge,

An order is issued by sovereign authority to the effect that in a certain matter the opinion of a certain jurist is most in the interest of the people, and most suited to the needs of the moment, and that action should be taken in accordance therewith. The judge may not act in such a matter in accordance with the opinion of a jurist that is in conflict with that of the jurist in question. If he does so, the judgment will not be executory⁴³

The Ottoman legislators who took the aforementioned legal principles as their basis actually legislated more than one thousand codes that included detailed provisions in such fields as property issues, prescription and *ta'zîr* penalties. The codifications by Muhammad the Conqueror, Sulaiman the Lawmaker and Ahmad III were among the general and most well-known examples. We will refer to these codifications, which were actually complementary parts of Islamic Law, from time to time.⁴⁴

d) Prior to the *Tanzîmât* Reforms there were also some legislation movements that started due to the close relationship with the legal and economic life of Europe. Nevertheless, the actual date of the codification movements in today's sense was the date of the promulgation of the *Tanzîmât* Movement.

Although some researchers hold that the legal progressions display a customary law (*'urfî huqûq*) that was completely distinct from Islamic law, we should understand that that was not the case, given the information we will provide regarding public law.⁴⁵

5.2.4.1.2 The Branches of Law Arranged by the Legal Codes (Qanunnâmes)

Indicating those branches of law arranged by the Legal Codes also means indicat-

⁴³ The Committee, *Majalla-i Ahkâm-i 'Adliyyah*, (The Ottoman Courts Manual (Hanafi)), Article: 1801.

⁴⁴ Akgunduz, *Osmanlı Qanunnameleri ve Hukukî Tahlilleri*, vol. I-IX (Istanbul: OSAV, 1989-1992); Muhammad Amin ibn 'Umar ibn al-'Âbidin, *Redd al-Muhtâr Alâ al-Dürr al-Mukhtâr*, Vols. I-VI, (Cairo: Maktaba al-Halabi, 1967), vol. I, pp. 55, vol. 3, pp. 395-96; Zarkâ, *Al-Fiqh al-Islâmî*, 1/202ff; Barkan *Qânûnlar*, pp. IXff; PA, *Tapu Tahrîr Defterleri* (Title-Deed Office Registry Books); Karakoç, *Kulliyât-î Qawanin*, File 1; MTM, vol. I, pp. 49ff.

⁴⁵ Cf: Herbert J. Liebesny, *The Law of the Near and Middle East: Readings, Cases, & Materials*, (Albany: New York State University Press, 1975), pp. 46-63; Akgunduz and Jin, *Türk Hukuk Tarihi*, vol. I, pp. 148-50.

ing the legislative authority granted to the state by the religion in the Ottoman State and relations in that sense as well as revealing if the Ottoman Law was secular.

Because it would take too much space to expound the legal decrees, contents and *Sharī'ah* bases of the Legal Codes, here we will only look at the two most comprehensive examples of this in order to clarify what the Ottoman Legal System actually was. It is possible to classify all the Ottoman Laws into two main exemplary categories.

First, there is the essential *Ottoman law*, which covers various decrees pertaining to different branches of law. Here we will use Sultan Sulaiman the Lawmaker's law basis for our analysis since it is the most comprehensive and regular.

Second, there is Sultan Muhammad the Conqueror's Law for Organization arranging the questions of constitutional and administrative law.

Sultan Sulaiman the Lawmaker's Law consisted of three chapters.

The first chapter arranged the penalties of *ta'zīr* (reproof) pertaining to criminal law, or rather punishments of fines and beating with a stick conveyed to rulers (*Ulu al-Amr*) in four sections. Seven types of crimes and penalties of *hadd*, principles pertaining to all the crimes committed against an individual and their penalties were not included in the Law, for they had been arranged through the *Sharī'ah* rules codified in books of Islamic jurisprudence. In other words, this part of the Law dealt with only one fifth of criminal law. The source in the part that formed four fifths of that arranged by *Sharī'ah* rules was constituted by books of jurisprudence.

The second chapter arranged some decrees regarding *land law*, viz. property law and financial law. The basis of the second chapter was constituted by state property, i.e. land subject to *kharāj* (tribute), and excise taxes collected in return for the *kharāj* tax (land tax paid by non-Muslim subjects). The topic, called "*bâj*," covers the details of the chapter of '*âshir*' (tithe collector) in the books of Islamic jurisprudence. As consequence, this chapter arranges an issue of property law (land law), the origin and essence of which are based on the *Sharī'ah*, and some topics on financial law. But issues like *yaya* (infantry), *musallam* (recruits engaged in military service in lieu of tax payments) and the like pertain to "military law," which is not very important among the branches of law.

The third chapter arranged some private topics concerning "military" and administrative law. As a consequence, this general "law," which formed a basis for 90% of the Ottoman Legal Codes, codifies one fifth of criminal law, military law, solely state land under property law, some matters concerning administrative law.

Our second example is the Conqueror's Administrative Law, which arranged only some issues concerning administrative law and, by exception, "constitutional law." On the basis of these brief explanations, the following questions ought to be posed:

Were the “Ottoman Legal Codices” composed only of criminal law, finance law, property law, a single issue of property law, administrative law and “military” law? Of course not. Then what was the real legal system? It is possible to find the answer to this question through a brief scrutiny of *Shar’iyyah Records*, which were examples of applied law.

Nevertheless, it could be stated that the Ottoman Legal Codices were – with the mere and exclusive exertion of the authority Islam granted to the state – composed of military law, administrative law, certain fields of financial law, and such principles of criminal law with respect to crimes and punishments that were not contrary to Islam.⁴⁶

5.2.4.1.3 *The Ottoman Legal System According to Sharī’ah Court Records*

The most significant evidence that will help us determine the most accurate view of the Ottoman legal order are the *Shar’iyyah Records (al-Sijillat al-Shar’iyyah)*, i.e. decrees of the Ottoman courts.

Scrutiny of these records will allow us to see clearly the sources of Ottoman law, to what extent the Ottomans applied *Sharī’ah* (Islamic law), which they called *Shar’-i Sharīf*, the restricted legislative power of sultans and state officials called *ulu’l-amr*, the practical fields of consuetudinary laws, which were not definitely mentioned either in the Qur’an or in *Sunnah* (the Traditions of Muhammad) and were left, through interpretation, to the limited legislative power of those state officials of the time, viz. issues that were arranged by the Legal Codes. The adoption of any opinion on Ottoman Law without studying these records would be merely prejudicial and unscientific. Accordingly, we are now going to study closely which branches of law were arranged by *Shar’-i Sharīf* in those judgments in the *Shar’iyyah Court Records*.

A) From the exemplary records with respect to personal Law, a branch of private law, we are informed that Ottoman Law recognized natural and legal persons, and the *Sharī’ah* decrees regarding competence, disappearance, personal rights and similar issues were applied precisely. The essential reference in this topic is the *Sharī’ah* rules in the books of Islamic jurisprudence (*fiqh*).

Again, those exemplary records regarding *family law* informs us how Muslim family structure, becoming engaged and married, and similar institutions were formed in conformity with *Sharī’ah* rules, and the right to divorce, which is thought to have been merely at the husband’s discretion, was also used by women. But such issues that were related to offspring, guardianship, and maintenance allowance, etc. were

⁴⁶ Topkapı Palace Museum Library, no. R. 1935, doc. 10/B-14/a.

judged in accordance with books of Islamic Law (*fiqh*).

The majority of those records concerning inheritance law are composed of inheritance contracts (*tahâruj*), the state's right of inheritance, heritage divisions, and exemplary wills, in all of which the principles of *Ilm al-Fara'idh* (the science of dividing an inheritance) were strictly observed. The only exception is the transfer of the disposal right for public estate, which was left to legal codes.

In the *Shar'iyyah* Records, judgments that were related to *the laws of commodities, loans and trade and*, in which the decrees of "transactions" (*mu'âmalât*) in the books of Islamic law were followed precisely, in which respect the exception was again the disposal right for public estates, which was arranged via legal codes.

Again, those examples inform us that the *Sharî'ah* rules on *states' private law* were applied; the *dhimmî* (non-Muslim subjects) were also judged – at their own discretion – by the decrees of *Shar'-i Sharîf* (*Sharî'ah*) in issues other than civil status (*al-ahwâl al-shakhsiyyah*) and devotions (*ibâdah*).

B) Since discussions about the Ottoman law focus on civil law especially, it will be useful to study the subject in detail from the perspective of the *Shar'iyyah* Records.

In essence, we learn from those *Shar'iyyah* Records regarding criminal law that the Ottoman State applied the decrees of *Shar'-i Sharîf*. Nevertheless, the issue should be evaluated well within the frame of its own features. As is well known, crimes and penalties are classified into three main groups in Islamic Law:

a) Those crimes and penalties of *hadd*, whose degrees and elements are clearly determined in the Qur'an and *Hadiths* (Traditions of the Prophet Muhammad), which are *hadd al-qadhif* (accusing a virtuous woman of inconstancy), robbery (*hadd al-sirqah*), banditry (*qat' al-tarîq*), adultery (*hadd al-zinâ*), drinking (*hadd al-shirb*) and insurgence (*hadd al-baghy, hirâbah*). The *Shar'iyyah* Records evidence that the Ottoman State applied *Sharî'ah* punishments fixed for these crimes exactly if the elements of those crimes were found.

b) *They are crimes that are committed against individuals.* Again, from the *Shar'iyyah* Records we know that retaliation (*al-qisas*), blood money (*al-diyah*) and other penalties determined by *Sharî'ah* rules had been precisely applied unceasingly for 500 years. Even the work of 'Umar Hilmi Effendi on this issue, called *Mi'yâr al-Adâlah* (Criteria of Justice), was adopted as a semi-official penal code towards the end of the Ottoman State.

c) There are crimes and punishments that fall outside the ones mentioned above, which in Islamic and Ottoman Law are called *jazâ al-ta'zîr, jazâ al-siyâsah al-Shar'iyyah* or *jazâ al-siyâsah*, whose degrees and methods of application are transferred to senior officials (*ulu'l-amr*). Here those decrees mentioned in the first sections of the general legal codes pertaining to Sultan Muhammad the Conqueror,

Bayezid II, Selim the Excellent and Sulaiman the Lawmaker arrange these crimes and penalties. In the *Shar'iiyyah* Records the term used for penalties of that kind was “*punishment of reproof following the code.*”

Those *Shar'iiyyah* Records with reference to the law of trial procedure evidence that, while the Ottoman State applied *Sharī'ah* rules in this matter as well, in *rasm al-qismah* and similar exceptional issues they acted in conformity with the traditions, customs and the social and economic conditions of the time, the most outstanding example of which is the issue of deeds. Since the issue is very explicit, we will not look at the details here.

On the other hand, the judgments of Execution and Bankruptcy were arranged according to *Sharī'ah* principles. Also, records are found regarding the law of finance in *Sharī'ah* records which show that many problems regarding laws of finance were solved in conformity with essentials of *Sharī'ah* law.

As for administrative and constitutional law, we see various imperial edicts (*fir-mans*), codes of law (*yasaqnamahs*), *adālatnamahs* and rescripts that had been arranged within the framework of the limited legislative power assigned by Islamic Law to state officials.

The most important evidence of what we have said up to this point are the *Shar'iiyyah* Records we inherited from the Ottoman State. The researches recently carried out on these records by historians, jurists and theologians prove the above-mentioned facts exactly. Let us now conclude this issue with an example. The doctoral thesis of Fethi Gedikli called *Mudārabah Partnership in the Ottoman Shar'iiyyah Records in the XVI and XVII Centuries: The Example of Galata* shows that the decrees in the Ottoman *Shar'iiyyah* Records were in complete accordance with the *Sharī'ah* rules in the books of Islamic jurisprudence.⁴⁷

5.2.4.1.4 Ottoman Law as a Whole

The analysis of the two essential sources of information as regards to the Ottoman Law, viz. Legal Codices and *Shar'iiyyah* Records leads to the following conclusions:

A) Ottoman Law only and solely comprised administrative law, exceptionally various subjects of constitutional law, those subjects of property law with respect to state land, military law, financial law, and the crimes of *ta'zīr* (punishment by way of

⁴⁷ Nu'man Effendi Dabbaghzadah, *Jāmi'al-Sak*, (Istanbul: 1214), pp. 288-91, 298-310, 312, 335; Ahmed Akgündüz, *Shar'iiyyah Sijilleri*, vol. I (Private Law), vol. II (Public Law) (Istanbul: Turk Dunyasi, 1989); Fethi Gedikli, *XVI. ve XVII. Asır Osmanlı Şer'iyye Sicillerinde Mudārebe Ortaklığı: Galata Örneği*, PhD diss., Istanbul University, 1996.

reproof) of criminal law and penalties, and decrees regarding some exceptional issues of private law. In the issuance of decrees on the above-mentioned subjects it codified *Sharī'ah* principles –, since matters transferred to the rulers' arrangements would be decided in consideration of such secondary sources as the public good, customs and traditions. Since it could never be alleged that a state's legal system consists only of the above-mentioned subjects, it could not be claimed that those issues were arranged in disregard of *Shar'-i Sharīf*. Our explanations below will clarify this. Moreover, looking at those legal codes that form merely around 15% of the Legal Order and without examining, their contents does not allow us to call a legal system secular or anything else.

B) The study of the Shar'īyyah Records prove that in the Ottoman State Sharī'ah decrees were taken as the basis for personal law, family law, inheritance law, jus obligationum, commodity law, financial law, and for all the branches of private law regarding international private law, for the whole of procedural public law, for 80% of penal law, the majority of financial law, and the general principles of jus gentium, administrative law, and constitutional law. Those we have mentioned average 85% of all legislation.⁴⁸

5.2.4.2 Legal Developments in the Post-*Tanzîmât* Period (1255 -1345/1839-1926)

Detailed information will be given on post-*Tanzîmât* legal developments in the sections on those developments. Therefore, we will concentrate here on certain information that indicates the course of these developments. A completely new page was opened in Ottoman history of law with *Gülkhane Khatt-i Humayûnu* (imperial edict) promulgated at the Gülkhane Park on Sunday, 26 *Sha'ban* 1255/1839. The Westernization Movement in the Ottoman State, which started with Sultan Selim III and continued with Sultan Mahmud II, began to yield fruit with the *Tanzîmât Firman* (imperial decree) that was promulgated during the reign of Sultan Abdulmajid. According to that *Firman*, "Some new codes must be introduced so that the Ottoman State can be governed in the best way. These codes will be legislated particularly in the fields of the security of lives, property and chastity, tax Law and the army." These laws would be prepared "in perfect pursuance to" "*Sharī'ah Law and the Decrees of Holy Qur'an*."⁴⁹ Nevertheless, despite all these statements, it is certain that there was

⁴⁸ Ibn al-Qayyim Al-Jawziyya, *I'lam al-Muwaqqi'in*, vol. pp. 372-78; PA, YEE, no. 14-1540, p. 12ff; Cin-Akgündüz, *Türk Hukuk Tarihi*, vol. I, (Konya: Selçuk University, 1989) pp. 140, 157.

⁴⁹ *Gülkhane Khatt-i Humayûnu* (Imperial Edict of Gülhane), *Dustûr I. Tartîb*, vol. I, pp. 4-7; Halil Cin, *İslâm ve Osmanlı Hukukunda Evlenme* (Marriage in Islamic and Ottoman Codes), (Ankara: Ankara University, 1974), pp. 285ff.

some duality in Ottoman law after 1839, for the Supreme Authorities, called *Ulu al-Amr*, exceeded the limits of the limited authority appointed to them through Islamic law from time to time, and they discriminated between legal regulations as codes with religious and national bases and codes with a European basis. Because we will discuss the information on those codes regarding that discrimination in the sections concerned with that issue, here we will merely indicate the outstanding features of this period:

a) The *Sharī'ah* decrees in books on *fiqh* began to be codified in consideration of the requirements of the time in the form of codes, instructions and regulations through legal arrangements. *Majalla*, which was studied in books on jurisprudence under the topic of *Mu'âmalât*, and arranged decrees regarding loans, property and procedures into a code of 1851 articles, and the Land Law, which consisted of *fatwâs* and *Irâdahs* (sultan's edicts) regarding land, are the most typical examples of this.⁵⁰

b) On the other hand, the field of codification movements was expanded and the reasons for codification increased. Codification movements gained speed due to factors such as the development and increase of economic relationships in domestic and foreign fields, the emergence of new legal institutions because of that increase, growing companies in Europe, e.g. insurance and brokerage companies, the severe requirement for certain contractual conditions, of which the Hanafî school did not approve, such as *Pey Akcha=Urbûn* (Earnest Money), the fact that the state wanted to regulate real estate, the requirement for title deed registration and similar formal conditions, and the decrease in the number of wise Muslim jurists who were able to find *Sharī'ah* solutions to recently emerging legal problems. The limits of the legislative power appointed by Islamic Law to *Ulu al-Amr* (rulers) in the commercial law, real estate law and the law of procedures were excessive to the extreme, and some codes – like the law of criminal procedures – were adapted from Europe word for word.⁵¹

In our opinion, the codes that were introduced after *Tanzîmât* were of two types with respect to quality:

First were codes consisting of legal provisions that were directly related to the quintessence of the law and required systematic changes – such as if it is permissible to sell a piece of real estate in the possession of a junior, or the issue of *'Iddah* (Period). Jurists endeavored to follow the principles of Islamic Law in codifications pertaining to the aforesaid type of decrees. In criminal law they did not interfere with the penalties of *Hadd* and *Qisâs* (retaliation) but only arranged *Ta'zîr* penalties that were

⁵⁰ Akgündüz, *Kulliyât*, pp. 364ff; Zarkâ, *Al-Fiqh al-Islâmî*, vol. 1, pp. 208-12; Karakoç, *Tahşiyeli Qavanin* (Codes with Footnotes), I/Aff; Osman Öztürk, *Majalla*, (Istanbul: 1973), pp. 10-123.

⁵¹ Akgunduz and Jin, *Türk Hukuk Tarihi*, vol. I, pp. 150-2; Cf. Liebesny, *The Law of the Near and Middle East*, pp. 46-63.

left to *Ulu al-Amr* (rulers). Nevertheless, it has been observed that some violations took place in that field, too.

The *second* were formal laws in which changes did not necessitate any changes in the system. The Law of Criminal Procedures, dated 1296/1879 and the Trade Law as well could be considered within this group. In the meantime, we ought to mention here that legal arrangements were also realized in such fields as insurance and interest, about which either no decree had been issued or the practice had been forbidden in Islamic law. We could say that a lot of the laws borrowed in this meaning from the West after the proclamation of *Tanzîmât*.⁵²

c) That implementation by Muslim Turks who had been taking the views of the Hanafî *madhhab* for centuries as their basis began to change after *Tanzîmât* Reforms and particularly during the period close to the Republican Age. Those jurists that studied different codes in the world, especially European civil law, worked at similar domestic codes that were to be introduced from the perspective of their system and content and at preparing such issues as were in conformity with the perception and requirements of the century. That work required jurists to look at the views of the other *madhhabs* of Islamic Law that were in concordance with the requirements of the age. From then on, jurists began to refer not only to the books on jurisprudence from the Hanafî *madhhab* but also to those of the other *madhhabs* in preparing new codes, which was actually the case, though very little, in *Majalla*. On the other hand, the Decree for Family Law of 1917 became the first and most significant example of those qualities. Yet we observe that the committees of *al-Ahwâl al-Shakhsiyyah* and *Wâjibat*, which were established in the Republican Age, took that method of working as their basis. Furthermore, we see that those committees went even further and aimed to integrate European laws with the principles of Islamic law.⁵³

On the other hand, the laws that were introduced by *Majlis al-Mab'ûsân* (Parliament), which became the legislator of Ottoman Law, with the constitutional monarchy promulgated after *Tanzîmât* Reforms, were disputed from the point of view of their conformity with *Sharî'ah*, which produced diverse opinions.⁵⁴

We could summarize that the history of Islamic law in the Ottoman state can be

⁵² Mustafa Ahmed al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid* (Damascus: Dar al-Qalam, 1998), vol. 1, pp. 212-19; Cin, *Evlenme*, pp. 289ff; Öztürk, *Majalla*, pp. 10ff.

⁵³ Mecelle Esbâb-ı Mûcibe Mazbatası (Report on the Raison d'Etre of Majalla), Akgündüz, *Külliyât*, pp. 375ff; Hukuk-u Aile Kararnamesi Mazbatası (Report on Decree of Family Law), Akgündüz, *Külliyât*, pp. 313ff; Ukûd ve Vâcibât Komisyonları Çalışma Esasları (Working Principles of Commissions of Uqud and Wâjibat), *Jarida-i Adliye* (Judicial Gazette), 2nd Series, Issues 12-21, Supplementary Sheets, pp. 3ff; Issue 16, Supplementary Sheet, Vâcibat Komisyonu Zabıtları (Minutes of Wâjibat Commission); al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid*, vol. 1, pp. 219ff.

⁵⁴ Akgunduz and Cin, *Türk Hukuk Tarihi*, vol. I, p. 152.

divided into periods. As we mentioned before, the first period runs from the foundation of the Ottoman state until *Tanzîmât* (1839). Fiqh books and texts of the laws (*qânûns* and *fatwâs*) are sources of this period. Texts of the laws put into force during the first period are recorded in the *Dîwân-i Humâyûn* (the record of the state). But with the publication of the *Taqwîm-i Waqâyi'* (an official paper giving in full all laws and decrees in 1247/1831, these texts were printed and announced therein. There followed the period from *Tanzîmât* to 1324/1906 when the constitutional system of government was reinstituted. It is also possible to classify the laws promulgated after reinstitution of constitutional government to the end of the First World War as a third period.⁵⁵

5.2.4.3 The Ottoman Civil Law: Majalla

We will give more detailed information about *Majalla* in the fourth book (on Private Law); but we need to give here general information relating to history of Islamic law.

The full name of the Ottoman Civil Code, for which we will use the short form *Majalla* was *Majalla-i Ahkâm-i 'Adliyyah*, and was known in Europe as *Qawânîn al-Mulkiyyah li al-Dawlah al-'Aliyyah* (The Civil Code of the Ottoman State). As is evident from its name, *Majalla* was the law book that codified those *Sharî'ah* decrees concerning loans, effects and law of procedure existing in books on *fiqh* (Islamic jurisprudence) based on the restricted power of the *Ulu al-Amr* (ruler), which was expressed as legislating *Sharî'ah* decrees. As a matter of fact, the term *Majalla* means: a book comprising diverse issues. Since it is out of the question that *Majalla* would include the opinion of anyone other than those involved in Islamic law, no view concerning different *madhhabs* was stated, with the exclusion of some exceptional issues contrary to the views of Hanafîte School. Due to the reasons we will indicate below, those *Sharî'ah* decrees in *Multaqâ*, which had been adopted as a law book for centuries was developed into a law book comprised of 1851 articles, also in close reference to other books on *fiqh* (Islamic jurisprudence) and *fatâwâ* (judgments), and that law book was called *Majalla*..

The first reason for the preparation of *Majalla* was that courts, viz. *Mahkama-i Nizâmiyyah* (civil courts), had been established. But, in particular, the second reason was the fact that the judges of the *Nizâmiyyah* courts were incompetent. As was the case in all the post-*Tanzîmât* (Reforms), arrangements, there was pressure from the West and Western countries regarding this. Because *Tanzîmât Firman* (Edict of Reforms) had been promulgated in consultation with the West, their demands were al-

⁵⁵ Abu al-Ula Mardin, "Development of the Sharia under the Ottoman Empire," p. 290.

ways a driving force in arrangements as well. According to the Protocol of *Majalla*, another reason for the preparation of *Majalla* was the fact that there were several views on some matters in the Hanafite School that had been officially applied by Muslim Turkish states for centuries and had, therefore, were widespread. Accordingly, it became hard to single out and apply the strongest view.

Judgments arising from *ijtihâd* (jurisprudence) may change with changing customs and traditions, the public good and similar circumstances; the principle here was expressed in *Majalla* as “*The amendment of some legal decrees cannot be denied with the changing times.*”⁵⁶ And, truly, the social, legal and economic changes before and after *Tanzîmât* actually necessitated the preparation of a civil law. *Majalla* attempted to respond to the newly emerging requirements within the frame of Islamic Law and therefore -although in several exceptional cases- abandoned the dominant opinion in the Hanafite School and codified one of the other views. Nevertheless, reference was made to the other schools= views in the amendments of *Majalla* as well.

The reasons we have mentioned briefly above show that legislation movements in the West and in the preparation of *Majalla* underwent similar developments in the social, economic and legal fields. There was, in fact, no similarity with respect to the other reasons. Unlike the West, *Majalla* in the Ottoman State was caused neither by developments in the science of law nor any novel movements in philosophy or law. Rather, several reasons, which we mentioned above and which were not related to the quintessence of the issue, led to the codification of the existent *Sharî'ah* decrees. This point is worth mentioning.

Deficient as it might have been, *Majalla* truly merited being the civil law of the Ottoman State, in which those *Sharî'ah* decrees concerning the procedures in books on *fiqh* (Islamic jurisprudence) were codified through the use of the restricted legislative authority granted to *Ulu al-Amr* (ruler) by Islamic Law. That legislative power was only a formal power, and the power of *Ulu al-Amr* was reflected merely in some disputed matters. Furthermore, all the *Sharî'ah* decrees bound all the Muslims in the Ottoman State as result of its ratification by *Ulu al-Amr* from the position of jurisdiction, which was indicated in its Protocol. While the fact that *Majalla* lacked chapters on such matters as family and inheritance law – which prevented it from becoming an absolute civil code – actually originated from the fact that Islamic Law granted privileges to minorities regarding civil status, the fact that *Majalla* consisted of procedural decrees was caused by the characters of that time and the structure of the Ottoman judicial institution.

The system of *Majalla* was that found in the books on *fiqh* (Islamic jurisprudence). In other words – contrary to the allegations of some – it was not casuistic.

⁵⁶ The Committee, *Majalla-i Ahkâm-i 'Adliyyah*, The Article: 39.

Perhaps, since they went into details on some issues in connection with the tradition of the codification, at the time a mixed method, which could be called *abstract/casuistic*, was taken as its basis. Its expressions are accurate and fluent, in perfect Turkish. The objection as to how a civil code could be composed of 1851 articles – aside from those on family and inheritance – is not justified, for *Majalla* consisted of decrees on not only effects and loans but also procedure. If 400-odd articles deal with procedure, 200 with commerce and 100 with general principles, there are still 1100 articles left over. In fact, the Turkish Civil Code and the Law of Obligations have more than 900 articles on goods and loans. We hold that a difference of 200 articles does not necessarily require any methodical differentiation.

The sources of *Majalla*, as were mentioned in the Protocol of Rationale, were books on *fiqh* (Islamic jurisprudence) written in conformity with the Hanafite School, the explications and footnotes of them and books of *fatâwâ* (judgments), in brief Islamic Law. As a matter of fact, the work called *Mir'ât al-Majalla* was written to prove that very fact and to show the sources of the articles of *Majalla* in books on *fiqh*. Claims that *Majalla* was prepared under the influence of *Code Napoleon* or Roman law are false.

Majalla was a legal code comprised of 1851 articles, and it consisted of a prologue and sixteen books. The first 100 articles cover general law principles under the category *Qawâ'id al-Fiqhiyyah* (The General Rules of Islamic Jurisprudence to shed light on the general spirit of Islamic law and to serve as an exclusive guide for judges. Since these ensured easy comprehension of individual legal issues, they also constituted the sources and rationale of legal decrees. The General Rules are consistent with natural law and principles at which modern law had arrived after quite a few disputes and phases of progression. The said rules might be classified as the rules of legal interpretation, procedure, prescription, obligation, participation, administrative disposals, wrongs, and the like. Most of the remaining sixteen books of pertained to loans, and then goods and law of procedure. Yet the chapter concerning incorporations was considerably significant.

At that time the French attempted to have the Ottoman State adopt their civil law, a proposal cautiously submitted to the sultan for consideration by Grand Vizier 'Ali Pasha in 1284/1867, whereas the sultan had already instructed the grand vizier to have the *Code Civile* translated from Arabic into Turkish. Our view here is supported by the endeavors by the then charge d'affaires of France in Istanbul. In fact, Jawdat Pasha mentions in his work *Ma'rûdhât* the role of the French Ambassador De Bourre, who stated plainly that various Ottoman civil servants had been made into tools of French policy. Consequently, the French ambassador convinced 'Ali Pasha on that subject, whereupon 'Ali Pasha started preparations. Nevertheless, those efforts proved to be of no avail; and in a dispute in the Council of Ministers, the motion for the adop-

tion of French Civil Law was rejected as a result of the objections made by Ahmed Jawdat Pasha⁵⁷, Fuad Pasha and Shirwani-zâdah Rushdu Pasha – despite of the insistent demands of 'Ali Pasha and Qabuli Pasha – and it was eventually decreed that *Majalla* be prepared.

When the decision was made that a national civil law was to be prepared, the Association of *Majalla* (*Majalla Jam'iyeti*) was formed under the chairmanship of Ahmed Jawdat Pasha, Minister of *Dîwân-i Ahkâm-i Adliyyah* (Civil Court) to prepare *Majalla*. This association prepared the first 100 articles and the first book, *Kitâb al-Buyû'*, through intensive studies and submitted them to the scrutiny of jurists, particularly *Shaikh al-Islam*. Then, after the necessary corrections had been made in light of criticisms, it was submitted to the Office of the Grand Vizier with a Protocol dated 1285/1869 and took effect following the imperial decree issued within the same year. That was followed by fifteen other books and eventually *Majalla* was completed with *Kitâb al-Qadhâ*, dated 1293/1876.

During the eight years in which *Majalla* was being prepared (1868-1876) the opposing civil servants and the French ambassador De Bourre did their best to nullify that work. In fact, as result of those efforts, Jawdat Pasha was dismissed from his office of Minister of *Dîwân-i Ahkâm-i Adliyyah* in 1287/1869 and, after completion of the 4th book of *Majalla*, from the association as well. However, those civil servants who perceived that the task could not be carried on without Jawdat Pasha had him reappointed to this task and promoted him to even higher positions. Use was made of the eminent jurists of the time, especially *Ahmed Jawdat Pasha*, in the preparation of *Majalla*.

Since *Majalla* comprised significant reforms with respect to system and contents at the time and had been written with very sound legal reasoning, it was adopted and applied not only in Turkey, within its present boundaries, but in a broader area covering Egypt, Hijaz, Iraq, Syria, Jordan, Lebanon, Kıbrıs (Cyprus), Palestine and Israel. In fact, *Majalla* remained in force until 1928 in Albania, Bosnia and Herzegovina and until 1984 in Kuwait. Research has revealed that some decrees of *Majalla* are still in force in Israeli law even today.⁵⁸

⁵⁷ Ahmed Jawdat Pasha (1822 —1895) was a famous Ottoman statesman, historian, sociologist, and legist. He played an important role in the preparation of Mecelle, the civil code of the Ottoman State in the late 19th and early 20th centuries, which was the first codification of Islamic law with Western standards. Cevdet Pasha oversaw the formulation of the Mecelle. He is also well known for a book on Ottoman history, now known as Cevdet Paşa Tarihi ("History of Cevdet Pasha"). Ahmed Cevdet Pasha's grave is located in the graveyard of the Fâtih Mosque in Istanbul.

⁵⁸ Ahmed Jawdat Pasha, *Ma'rûdhât* (Petitions), (Istanbul: Enderun, 1980), p. 200; Türkgeldi, Ali Fuad, *Rijal-i Muhimma-i Siyasiyyah* (High Officials of Politics) (Istanbul: TTK, 1928, p. 127; Findıkoğlu, Z. Fahri, *Hukuk Sosyolojisi* (Istanbul: Istanbul University, 1958), p. 244; Mardin, Abul-Ula, *Medenî Hukuk Cephesinden Ahmed Jawdat Pasha*, (Istanbul: Istanbul University, 1946), pp. 64-65, 66-88; Ba-

We should mention here that in Ottoman State the relationship between *madh-habs* was ranked accordingly. The *qâdhî* in the *Sharî'ah* courts judged according to his own school, and would, of course, consult a *muftî* from his own school. If, however, the case was referred to a higher court or *majlis*, it came into a multi-school body.⁵⁹

ron de Testa, *Recueil des Traités de la Porte Ottomane*, vol. VII (Paris: 1892), p. 469; Ahmed Jawdat Pasha, *Tadhakir* (Ankara: TTK, 1967), vol. IV, pp. 95f.; *Ma'rûdhât* (Petitions), p. 201; for Protocol see: PA, *İrade-Dosya Usulü*, no. 65/7; Akgündüz, *Külliyât*, pp. 372ff.

⁵⁹ Cf. Sâmîr Mâzin al-Qubbaj, *Majallah al-Ahkâm al-'Adliyyah; Masâdiruhâ wa Atharuhâ fî Qawânîn al-Sharq al-Islamî*, ('Ammân: Dâr al-Fath, 2007), pp. 23ff; Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law*, (Oxford University Press US, 2005), pp. 219-20.

6 THE MODERN PERIOD AND ISLAMIC LAW

6.1 Some Discussions on the Contemporary Practice of *Sharī'ah* Law

The independence of Muslim countries, a recovered pride in their Islamic heritage, sensitivity to the religious sentiment prevalent amongst the majority of the population, and the conscious refusal to allow unrestricted alien influences in the development of law have led some legal thinkers of Muslim countries to formally declare the opening of the gate of *ijtihād* and codifying *sharī'ah* rules. There are many other reasons for these developments. During the 19th century Islamic law took a sharp turn due to the new challenges facing the Muslim world: the West had risen to a global power and had colonized a large part of the world, including Muslim territories. Agricultural societies changed into industrial ones; new social and political ideas emerged, and social models slowly shifted from hierarchical to egalitarian. The Ottoman State and the rest of the Muslim world were in decline, and calls for reform and codification became louder. In Muslim countries codified state law started replacing scholarly legal opinion. Western countries sometimes inspired, sometimes pressured and sometimes forced Muslim states to change their laws. Secularist movements pushed for laws deviating from the opinions of the Islamic legal scholars and Islamic legal scholarship remained the sole authority for guidance in matters of rituals, worship and spirituality while losing authority to the state in other areas. The Muslim community became divided into groups reacting differently to the changes. This division persists until the present day.¹

We see various opinions on Islamic law and its practice being discussed among Muslims and non-Muslims. We will discuss these opinions in the second book when we discuss the interpretation of Islamic law. We do not agree with some views, but we have to look at them for explanatory reasons. We would like to mention only some here.

Secularists or liberals believe the law of the state should be based on secular

¹ Wael B. Hallaq, *A History of Islamic Legal Theories, An Introduction to Sunnī Usūl al-Fiqh* (Cambridge: Cambridge University Press 2007), pp. 207-54; Maurits S. Berger, *Klassieke Sharī'a en vernieuwing*, WRR webpublicatie nr. 12 (Amsterdam: Amsterdam University Press, 2006), pp. 16-18; 'Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book*, (London: Zed Books, 2002), pp. 1-21; Ralph H. Salmi, Cesar Adib Majul and George Kilpatrick Tanham, *Islam and Conflict Resolution: Theories and Practices*, (University Press of America, 1998), pp. 61-2.

principles, not on Islamic legal theory.²

Traditionalists or conservatives believe that the law of the state should be based on the traditional legal schools.³

Reformers or modernists believe that new Islamic legal theories can produce modernized Islamic law and lead to acceptable opinions in areas such as women's rights.⁴

Salaffis claim to follow the Prophet Muhammad and his Companions, *tâbi'în* (followers of the Companions), *taba' al-tâbi'în* (followers of the *tâbi'în*) and those who follow these three generations.⁵

We could summarize the momentous change that took place in the Muslim world after 1800 in two main ways: *First*, there was a reduction of the Islamic law to the benefit of legal models taken from European countries. This has been the most dominant tendency in practiced law in most Muslim countries. *Second*, there was in all Muslim countries a counter-tendency to strengthen the Islamic law through codification of the *sharī'ah* and opening a wider space for *ijtihād*. The last decades of Ottoman state is the best example for codification of the *sharī'ah* and movements of modernization in Egypt by Muhammed 'Abduh and Rashīd Ridhā is a good example for the latter.⁶

The social transformation of early nineteenth-century Muslim societies was followed by economic encroachment by the West. Most of Muslim societies have started to find out for a solution of their problems via Islamic law. The problem facing Muslim countries today is how to adapt Islamic *Sharī'ah* rules and general principles to the social, political and economic demands of the present age. Earlier Muslim societies faced the same problem and provided solutions to it based on legal interpretations, the invention of *hadīths* or the arbitrary will of the ruler, who could always

² See for some extremist ideas: 'Abd Allāh Aḥmad Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a*, (Harvard University Press, 2008), pp. 1ff. Abdulkarim Soroush and Nasr Abu Zaid are among them too.

³ Cf. Christopher Roederer and Darrel Moeilendorf, *Jurisprudence*, (Lansdowne: Juta and Company Ltd, 2007), pp. 475ff.

⁴ We could mention among some contemporary examples of modernists Muhammad Abduh (1849-1905), Ali Shari'ati (1933-77), Hasan Turabi and Muhammad Khatami.

⁵ See Jasser Auda, *Maqāsid al-Sharī'ah as Philosophy of Islamic Law: A Systems Approach* (London: The International Institute of Islamic Thought, 2008), pp. 144-90; Nasr Abu Zaid, *Reformation of Islamic Thought. A Critical Historical Analysis*, WRR Verkenning no. 10 (Amsterdam: Amsterdam University Press, 2006), pp. 21-22; Mahmood Monshipouri, "Islam and Human Rights in the Age of Globalization," in Ali Mohammadi, *Islam Encountering Globalization*, (Routledge, 2002), pp. 91-110.

⁶ Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law*, (Oxford University Press US, 2005), pp. 222ff.

“persuade” a jurist to come up with a legal device to sanction his policies. Thus, throughout the centuries, Islamic *Shari’ah* developed into a variegated network of opinions, interpretations and judgments derived from various sources but always predicated on staying within divine law. In the last 100 years or so most Muslim states have, voluntarily or involuntarily, adopted “Western” codes while paying lip service to their Islamic laws. In most cases, they have found it much easier to circumvent Islamic rules than to change them. It was under the impact of foreign occupation and Westernization that European codes replaced *Shari’ah* in all but matters of personal status.⁷

In the post-World War II period, newly independent Muslim countries, seeking to assert their identity, included in their constitutions such provisions as “*Islam is the official religion of the state*,” “*the president of the republic must be a Muslim*” or “*the principles of Shari’ah are the primary sources of legislation*,” without ensuring that their laws were consistent with Islamic principles.⁸

There is tremendous variance in the interpretation and implementation of Islamic Law in Muslim societies today. Some movements within Islam have questioned the relevance and applicability of *Shari’ah* from a variety of perspectives. Islamic feminism brings multiple points of view to the discussion. Several of the countries with the largest Muslim populations, including Indonesia, Bangladesh and Pakistan, have largely secular constitutions and laws, with only a few Islamic provisions in family law. Turkey has a constitution that is officially strongly secular. India and the Philippines are the only countries in the world that have separate Muslim civil laws framed by a Muslim personal law board, and based entirely on *Shari’ah*, and the Code of Muslim personal law of the Philippines. However, the criminal laws are uniform. Some controversial *Shari’ah* laws favor Muslim men, including polygamy and the rejection of alimony payments.

Most countries in the Middle East and North Africa maintain a dual system of secular courts and religious courts in which the religious courts regulate primarily marriage and inheritance. Saudi Arabia and Iran maintain religious courts for all aspects of jurisprudence, and religious police enforce social compliance. Laws derived from *Shari’ah* are also applied in Afghanistan, Libya and Sudan. Some states in northern Nigeria have reintroduced *Shari’ah courts*. In practice, the new *Shari’ah courts* in Nigeria have most often meant the reintroduction of punishments. The punishments include amputation of one or both hands for theft, stoning for adultery and apostasy.

Many (including the European Court of Human Rights) consider the punishments

⁷ Roederer and Moellendorf, *Jurisprudence*, pp. 479ff; Berger, *Klassieke Shari’a en Vernieuwing*, pp. 16-18.

⁸ Fauzi M. Najjar, “Egypt’s Laws of Personal Status,” *Arab Studies Quarterly* 10/3 (1988): 319-45.

prescribed by *Shari'ah* barbaric and cruel. Islamic scholars argue that, if implemented properly, the punishments serve as deterrents. In international media, practices by countries applying Islamic law have fallen under heavy criticism at times. This is particularly the case when the sentence carried out is seen to tilt very much away from European standards of international human rights. This is the same for the application of the death penalty, for the crime of adultery and other punishments such as amputations for the crime of theft and flogging for fornication or public intoxication.

Although some Islamic rules have been interpreted variously in different times and places and by scholars, to describe these different views as fundamentalist, literal and traditional interpretations or lines is not true. Muslim scholars believe Islamic law should be legally binding on all people of the Muslim faith and even on all people who live under Muslim rule. There is confusion between accepting and respecting Islamic law as a divine law and implementing it in Muslim or non-Muslim countries. As we will explain below, a Muslim individual could live according to Islamic law but cannot implement those rules as a Muslim individual in Muslim or non-Muslim country.

In the modern era Islamic Law and its institutions have been eclipsed by the secular law and institutions used by the colonial powers and modern nation-states. In most Muslim nations the endowment properties that supported legal education have been confiscated by the government and placed under the control of a government ministry. The professors and others who teach and work in these institutions have become government employees. Secular education has radically reduced the importance of the *madrasahs* in the contemporary world. There has been a widespread application of Western legal codes, either the Napoleonic code or the related Swiss one, to the law of modern nation-states in the Muslim world, especially in the areas of commercial and criminal law. The only areas that have remained under the purview of Islamic law in most countries are family law, including marriage, divorce, inheritance and related topics. In these areas the flexibility of the law has been radically reduced by attempts to establish a standard code. In British India, for example, the *Hidâyah* by al-Marghinani (1196), *Minhâj al-Tâlibîn* by al-Nawawi (1277) and *Sharâ'i' al-Islam* by al-Muhaqqiq al-Hilli (1276) were chosen to serve as the law codes for Hanafî, Shâfi'î, and Twelver Shi'îtes, respectively.

At the same time, beginning in the 19th century, Muslim reformers like Muhammad 'Abduh, Rashîd Ridhâ and others attempted to reform Islamic Law from within. Approaches have varied widely. Some thinkers have criticized the insularity of the individual *madhhabs*, arguing for a sustained study of comparative law (*fiqh muqâran*) within traditional institutions. Other methods include choosing freely (*takhayyur*) among the opinions of past authorities or combining the legal doctrines of various *madhhabs* to come up with an appropriate solution, a process termed *talfiq* (patching, piecing together). These latter methods have been used in many actual reforms of

Islamic family law, such as the well-known reform of Anglo-Muhammadan law that drew on the Mâlikî tradition to alter Hanafî marriage law in order to facilitate access to divorce for women in bad marriages.

Other, more radical thinkers have argued that the law of the *madhhabs* should be jettisoned altogether and that a new Islamic law should be derived directly from the scripture, from the Qur'an alone, or from that portion of the Qur'an that was revealed in Mecca.⁹ These radical reforms have met with little success, since most movement in the Muslim world today seems to be in the opposite direction. Various forms of Islamic law have been applied in Saudi Arabia, Iran under the Islamic Republic, Afghanistan under the *Tâliban*, and Sudan. Moreover, some political groups throughout the Muslim world are clamoring for the application of the *Sharî'ah* in an attempt to fend off Western cultural influence, fight corruption, and engender public morality and social justice. The classical legal system has not lost its vitality and given the centrality of a divinely ordained law to Islam; it cannot easily be replaced or substituted. We will discuss these problems in the second book of this series.¹⁰

We believe, in fact, that

Through the decree, "*A perspicuous Arabic Qur'an*", Qur'an states that its meaning is clear. From beginning to end, the Divine address revolves around those meanings, corroborating them and making them self-evident. Not to accept those authoritative meanings suggests, denying Almighty God and insulting the Prophet's understanding. That is to say, those authoritative meanings have been taken successively from the source of Prophethood.¹¹

The Qur'an doesn't bring any new fundamentals or principal beliefs; it modifies and perfects existent ones; and it combines in itself the virtues of all the previous sacred books and the essentials of all the previous laws. It only establishes new ordinances in secondary matters, which are subject to change due to differences in time and place. For just as with the change of seasons, food and dress and many other things are changed; so too the stages of a person's life warrant changes in the manner of their education and upbringing. Similarly, as necessitated by wisdom and need, religious ordinances concerning secondary matters change in accordance with the stages of mankind's development. For very many of these are beneficial at one time yet harmful at another, and very many medicines were efficacious in mankind's infancy yet ceased be-

⁹ 'Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation Civil Liberties, Human Rights, and International Law*, (Syracuse: Syracuse University Press, 1996); cf. Salmi, Majul and Tanham, *Islam and Conflict Resolution: Theories and Practices*, pp. 103-7.

¹⁰ Hallaq, *A History of Islamic Legal Theories*, pp. 207-54; Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh: Edinburgh University Press, 2004), pp. 125-35.

¹¹ Bediuzzaman Said Nursi, "Twenty-Ninth Letter - First Section," *Letters*, (Istanbul: Sozler, 2002), p. 456.

ing remedies in its youth. This is the reason the Qur'an abrogated some of its secondary pronouncements. That is, it decreed that their time had finished and that the turn had come for other decrees.¹²

We think that we need urgently some classifications of Islamic rules to understand these different views about codification and reform of Islamic law.

6.2 The Classification of *Shari'ah* Injunctions and the Reform or Renovation of *Shari'ah* Law

According to Western scholars and some Reformers and Secularists in the Islamic world, Islamic family law reflected to a large extent the patriarchal scheme of Arabian tribal society in the early centuries of Islam. Not unnaturally, certain institutions and standards of that law were felt to be out of line with the circumstances of Muslim society in the 20th century, particularly in urban areas where tribal ties had disintegrated and movements for the emancipation of women had arisen.¹³ At first this situation seemed to create the same apparent impasse between the changing circumstances of modern life and an allegedly immutable law that had caused the adoption of Western codes in civil and criminal matters. Hence, the only solution that seemed possible to Turkey in 1926 was the total abandonment of *Shari'ah* and the adoption of Swiss family law as a replacement. No other Muslim country, however, has as yet followed this example. Instead, traditional *Shari'ah* law has been adapted in a variety of ways to meet present social needs.¹⁴

For various reasons, we do not agree with the Secularists' and Reformers' view stated above. But in our response to and critique of both views we would like to classify *Shari'ah* injunctions into some groups. Without these classifications, nobody can understand the nature of Islamic law and cannot criticize new interpretations.

6.2.1 *Classification of Shari'ah Injunctions According to Legal Authority*

All the provisions of regulations in Islamic Law are divided into two groups according to legal authority.

First, rules that were based directly on the Qur'an and the *Sunnah* and codified in

¹² Bediuzzaman, *Signs of Miraculousness, The Inimitability of the Qur'an's Conciseness*, (Istanbul Sozler Publications 2007), pp. 54-58.

¹³ See, for example, Muhammad Arkoun, *The Unthought in Contemporary Islamic Thought* (London: Publisher, 2002); Cf. Abdullahi Ahmad an-Na'im, Abd Allâhi, *Islamic family law in a changing world: a global resource book*, (London: Zed Books, 2002), pp. 1-22.

¹⁴ Dien, *Islamic Law*, pp. 135-36.

books on *fiqh* (Islamic law) were called *Sharī'ah* rules, *Shar'-i Sharīf* or *Sharī'ah* law; these rules formed 85% of the legal system. For example, *al-Durar wa al-Ghurur* by Molla Khusraw and *Multaqâ al-Abhur* by Ibrahim of Aleppo were viewed as the civil code for the Ottoman State. The sources for *Sharī'ah* Law were classified into two groups:

a) Primary sources, also called *al-Adillah al-Shar'iyyah*, of which there are four, i.e. the Noble Qur'an, the *Sunnah*, *Ijmâ'* (general concurrence and agreement/consensus in opinion and decision of the legalists) and *Qiyâs* (analogy).

b) Secondary sources, i.e. traditional rules and customs, *istislâh* (facilitating), *Is-tihsân* (commendation), ancient legal regulations, narratives from *Ashâb al-Kirâm* (the Exalted Prophet's Companions) and similar sources.

The study of Shar'iyyah Records (*Shar'iyyah Sijilleri*) proves that in the Ottoman State *Sharī'ah* rules were taken as the basis for personal law, family law, inheritance law, *jus obligationum*, law of commodities, commercial law and all the branches of private law with respect to international private law; in the whole of law of procedures of public law, for 80% of penal law, the majority of financial law and in the general principles of *jus gentium*, administrative law and constitutional law. All the above account is for about 85% of the legal system.

Second, financial law, land law, *ta'zîr* penalties, arrangements concerning military law and administrative law in particular were based on the restricted legislative authority vested by *Sharī'ah* decrees and those jurisprudential decrees that were founded on secondary sources such as customs and traditions and public good, which fell under public law, *al-Siyâsah al-Shar'iyyah* (*Sharī'ah* policies), *Qânûn* (Legal Code), *Qânûnnâme* and the like. Since these could not exceed the limits of *Sharī'ah* principles either, they should not be reviewed as a legal system outside of Islamic Law.¹⁵

The analysis of the two essential sources of information regarding Ottoman law, viz. legal codices and Shar'iyyah Records, leads to the following irrefutable conclusion: The Ottoman legislative authorities only and solely codified administrative law, exceptionally various subjects of constitutional law, those subjects of law of property regarding state land, military law, law of finance, *ta'zîr* (punishment by way of reproof) crimes in criminal law and their penalties and decrees regarding some exceptional issues of private law. In issuing decrees on these it codified *Sharī'ah* principles – if any; since, concerning matters transferred to the rulers' arrangements would be made in consideration of such secondary sources as the public good, customs and traditions.

¹⁵ Ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. IV (Beirut: 1973), pp. 372-78; PA (Basbakanlik Osmanli Arsivi), Prime Ministerial Ottoman Archives, YEE, no. 14-1540, pp. 12f.; Ahmed Akgunduz and Halil Cin, *Türk Hukuk Tarihi*, vol. I (Qonya: Selcuk University 1989), pp. 140-157.

Because it could never be alleged that a state's legal system consisted solely in the above-mentioned subjects, it could not be claimed that the stated issues were arranged in disregard of *Shar'î Sharîf*. The explanations below will clarify this matter.¹⁶

6.2.2 *Classification of Sharî'ah Injunctions from the Aspect of Their Nature*

Many Muslims or non-Muslims think that all injunctions in Islamic law, such as polygamy and slavery, were established by the Qur'an or the *Sunnah* directly, for which Islamic Law has been criticized severely. The supposition here is false. A further point that causes confusion is the view that there was no slavery, male or female, before Islam and Islam introduced it. However, there are two kinds of injunctions in Islamic law.

1. The **first** are injunctions that were laid down by Islam as principles for the first time since they did not exist in previous legal systems. That is Islam established these principles, such as *zakâh*, *waqf* (endowments) and the shares of inheritance. Muslim scholars state that these are completely beneficial for humankind as a whole. They also contain many instances of wisdom and purpose, even if people are not aware of them.

2. The **second** are injunctions that Islam did not introduce; they already existed and Islam modified them. That is, Islam did not establish them down for the first time; rather, they were part of the law systems of other societies and were applied in a savage form. Since it would have been contrary to human nature to abolish injunctions of this kind suddenly and completely, Islamic law modified them, so that they were no longer barbaric but civilized. Slavery and polygamy are good examples of this.¹⁷

6.2.3 *Comprehensive (Mujmal) and Detailed (Mufassal) Injunctions*

Another perspective yields two kinds of legal rules in Islamic law.

1. **Fundamental and Comprehensive Principles of Law (*Ahkâm al-Mujmalah*).** The Qur'an sometimes mentions certain fundamental principles of law and gives authority in detailed injunctions to *ulu al-amr* (the legislative organ=officials and judges,

¹⁶ Nu'man Effendi Dabbaghzadah, *Jâmi'al-Sak*, (Istanbul: 1214), pp. 288-91, 298-310, 312, 335; Ahmed Akgündüz, *Shar'iyyah Sijilleri*, vol. I (Private Law), vol. II (Public Law) (Istanbul: Turk Dunyasi, 1989); Fethi Gedikli, *XVI. ve XVII. Asır Osmanlı Şer'iyye Sicillerinde Mudârebe Ortaklığı: Galata Örneği*, PhD diss., Istanbul University, 1996.

¹⁷ Ahmed Akgündüz, *İslam Hukukunda Kolelik ve Cariyelik Muessesesi ve Osmanlı'da Harem* (Istanbul: OSAV, 2000), pp. 72-74; Bediuzzaman Said Nursi, *Munazarat* (Istanbul: Sozler Publications, 1990), pp. 74-75.

the rulers of the state, the powerful). For example “*Difficulty allows ease*” (*al-mashaqqah tajlibu l-taysîr*). Allah says: “*He has not put any constraint on you as far as the religion is concerned.*”¹⁸ A sick person, for example, does not have to fast. Allah says: “*And whoever among you is ill, or on a journey, [should fast] a [similar] number of other days. Allah wishes ease for you and do not wish difficulty for you.*”¹⁹ The Qur’an emphasizes “*the common good of mankind*”; it focuses on human responsibility because a focus on human rights can devolve into the selfishness of seeking to maximize one’s own freedom to do whatever one wants at the expense of others: “*O ye who believe! Fulfill (all) obligations.*”²⁰ It commands judges and state officials to implement the rules of justice and rightness: “*O you who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah. For, Allah is well-acquainted with all that ye do.*”²¹ Then, as we will explain in public law, there is room for jurists to engage in *ijtihâd* and a limited legislation power for *ulu al-amr* (public authority). The Ottoman State enacted 760 legal codes using this power and called this type of regulation ‘*Urfî Law*’.

2. **Detailed Injunctions (*Ahkâm al-Mufasssalah*).** Some injunctions are contained in the verses of the Qur’an or in the Sunnah with complete details of the commands. For this reason there is no room for *ijtihâd* concerning these injunctions. Examples of these are *hadd* punishments, rules concerning retaliation (*qisâs*), murder, theft, fornication and adultery (*zinâ*) and defamation (*qadhf*). The *Sunnah* is the interpreter of all undefined Qur’anic rules. Because the Qur’an is not only a law book, it has explained matters pertaining to worship jurisprudence, personal law and some penal rules especially and only indicated basic rules and general principles for other branches of law, e.g. penal law, constitutional law and administrative law. With this methodology the Qur’an maintained the dynamism of the Islamic legal system.²²

6.2.4 *Comprehensible and Incomprehensible Injunctions*

We should be aware that not everybody and sometimes no one can understand the meaning and wisdom of divine commands and prohibitions. Sometimes, these injunctions may become comprehensible after one or two or twenty centuries. Some-

¹⁸ The Qur’an 22:78.

¹⁹ The Qur’an 2:185.

²⁰ The Qur’an 5:1.

²¹ The Qur’an 5:8.

²² Abdulkarim Zaidan, *al-Wajîz Fi Usûl al-Fiqh*, (Baghdad: 1961), pp. 128-30; Ahmed Akgunduz, *Mukayeseli İslam ve Osmanlı Hukuku Kulliyâtı* (Diyarbakır: Dicle University Law School, 1986), pp. 43-44; Sulayman al-Izmîrî, *Hâshiyah alâ Mir’ât al-Usûl* (Istanbul: Matba’a-i Âmire), vol. I, pp. 86-87.

times the true nature of the human intellect is dimmed and influenced by internal and external factors such as desires, motives, habits, environment and association and, as a result, it even fails to give us true knowledge of things that are within its own sphere. Hence, reason often requires the service of a guide and helper who will protect it from straying, lead it to the right path, help it understand delicate and mysterious affairs and know the truth. This guide is the divine revelation received by a prophet. If anyone denies the necessity of this divine guidance through revelation and claims that reason alone is capable of giving us all the knowledge we need, then he will certainly overburden his reason and oppress it quite unreasonably.

For this reason we should divide *Sharī'ah* rules into groups:

1. Incomprehensible (*Ta'abbudī*= *Tawqīfī*=Divinely-Ordained) Injunctions: There are certain matters in the *Sharī'ah* concerning worship that are incomprehensible and are done because they are commanded. The reason for doing or not doing them is because they are commanded. The number of prostrations (*rak'ah*) in five daily prayers is a good example for this kind of injunctions. We should remember the non-divinely-ordained (non- *tawqīfī*) judgments—and even the divinely-ordained (*tawqīfī*) judgments. It is established in Islamic law how exactly acts of worship are to be performed. This is known in the *Sharī'ah* as *tawqīfī*. Again, the arrangement of the verses of every *Sûrah* in the form as it is in now in the present script (*Mushaf*) was determined by the revelation (*tawqīfī*) from the Prophet transmitted to him by *Jibrîl* from Allah. According to this arrangement the *Ummah* transmitted the Qur'an from the Prophet and there is no dispute about this. The order of the verses within the chapters (*Sûrahs*) was in the same form as we see today. As for the arrangement of some of the chapters (*Sûrahs*) they were put together according to the *Ijtihād* of Sahabah.²³

2. Comprehensible (*Ma'qûl al-Ma'nâ*) Injunctions: There are others that have a comprehensible basis, i.e. they possess some wisdom or benefit by reason of which they have been incorporated into the *Sharī'ah*. But that is not the true reason or cause: the true reason is the Divine command and prohibition.

Instances of wisdom or benefit cannot change those matters of the marks (*sha'â'ir*) of Islam that pertain to worship; that they pertain to worship is dominant and one may not interfere with them. They may not be changed, even for the sake of a hundred thousand benefits. Similarly, it cannot be said that "*the benefits of the Sharī'ah are restricted to those that are known.*" To suppose this is wrong. Those benefits may be only some instances of many instances of wisdom and purpose.

For instance, someone may say: "The wisdom and purpose of the call to prayer (*adhân*) is to summon Muslims to prayer; in which case firing a rifle would be suffi-

²³ Cf. Robert Gleave, *Inevitable Doubt: Two Theories of Shī'ī Jurisprudence*, (Leiden: Brill, 2000), pp.168-69.

cient.” However, the person does not know that that is only one benefit out of the thousands of the call to prayer. Even if the sound of a rifle provides that benefit, how, in the name of humankind or in the name of the people of that town, can it take the place of the call to prayer, the means of proclaiming worship before Divine dominion and the proclamation of Divine Unity, which is the greatest purpose of the creation of the universe and of the creation of humankind?²⁴

6.2.5 Possible Conclusion

We could look at some reforms or renewals from these perspectives because most of them may be included in the limited legislative power. This belongs to *Shari'ah* and does not lie outside its boundaries. Otherwise, Islamic law could not be a dynamic legal system. Islamic law allowed the political authority to make administrative regulations of two principal types.

The *first* type concerned procedure and evidence and restricted the jurisdiction of the *Shari'ah* courts in the sense that they are instructed not to hear cases that do not fulfill defined evidential requirements. Thus, an Egyptian law was enacted in 1931 that no disputed claim of marriage was to be heard in court if the marriage could not be proved by an official certificate of registration, and no such certificate could be issued if the bride was younger than 16 or the bridegroom younger than 18 at the time of the contract. Accordingly, the marriage of a minor contracted by the guardian was still perfectly valid but would not, if disputed, be the subject of judicial relief from the courts. In theory the doctrine of the traditional authorities was not contradicted, but in practice an attempt was made to abolish the institution of child marriage.

The *second* type of administrative regulation was a directive to the courts as to which particular rule among existing variants they were to apply. This directive allowed the political authority to choose from among the views of the different schools and jurists that which was deemed best suited to the present social circumstances. For example, the Hanafi law in force in Egypt did not allow a wife to petition for divorce on the grounds of any matrimonial offense committed by the husband, a situation that caused great hardship to abandoned or mistreated wives. Mâlikî law, however, recognizes the wife's right to the judicial dissolution of her marriage on grounds such as the husband's cruelty, his failure to provide maintenance and support, and desertion. Accordingly, an Egyptian law of 1920 codified the Mâlikî law as the law to be applied henceforth in the *Shari'ah* courts.

By way of comparison, codification in the matters of child marriage and divorce

²⁴ Sa'd-al-Din Mas'ud ibn 'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. II (Beirut: Dar al-Arqam), pp. 142-47; Bediuzzaman, "Twenty-Ninth Letter - First Section," *Letters*, p. 465.

was affected on the Indian subcontinent by statutory enactments that directly superseded the Hanafî law. The Child Marriage Restraint Act of 1929 prohibited the marriage of girls under 14 and boys under 16, while the Dissolution of Muslim Marriages Act of 1939, modeled on the English Matrimonial Causes Acts, allowed a Hanafî wife to obtain a judicial divorce on the standard grounds of cruelty, desertion, failure to maintain, etc.

In the Muslim world the potential for legal codification under the principle of *siyâsah* had been exhausted by the 1950s. Since that time the basic doctrine of *taqlîd* has been challenged to an ever-increasing degree. On many points the law recorded in the medieval manuals, insofar as it represents the interpretations the early jurists made of the Qur'an and the *Sunnah*, has been said to have a paramount and exclusive authority no longer. Contemporary jurisprudence has claimed the right to renounce those interpretations and to interpret for itself, independently and afresh in the light of modern social circumstances, the original texts of divine revelation – in short to reopen the door of *ijtihâd* that had been closed, in theory, since the 10th century.

The developing use of *ijtihâd* as a means for legal reform may be seen through a comparison of the terms of the Syrian Law of Personal Status (1953) with those of the Tunisian Law of Personal Status (1957) in relation to the two subjects of polygamy and divorce by repudiation (*talâq*).

With regard to polygamy, the Syrian reformers argued that the Qur'an itself urges husbands not to take additional wives unless they are financially able to make proper provision for their maintenance and support. Classical jurists had construed this verse as a moral exhortation binding only on the husband's conscience. But the Syrian reformers maintained that it should be regarded as a positive legal condition precedent to the exercise of polygamy and enforced as such by the courts. This novel interpretation was then coupled with a normal administrative regulation that required the due registration of marriages after the permission of the court to marry had been obtained. The Syrian Law accordingly enacts: "*The qâdhî may withhold permission for a man who is already married to marry a second wife, where it is established that he is not in a position to support them both.*" Far more extreme, however, is the approach of the Tunisian reformers. They argued that, in addition to a husband's financial ability to support several wives, the Qur'an also required that co-wives should be treated with complete impartiality. This Qur'anic injunction should also be construed not simply as a moral exhortation but as a legal condition precedent to polygamy in the sense that no second marriage should be permissible unless and until adequate evidence was forthcoming that the wives would in fact be treated impartially. But under modern social and economic conditions, such impartial treatment was a practical impossibility. And since the essential condition for polygamy could not be fulfilled, the Tunisian Law briefly declares: "*Polygamy is prohibited.*"

With regard to *talâq* the Syrian law provided that a wife who had been repudiated without just cause might be awarded compensation by the court from her former husband to the maximum extent of one year's maintenance. The reform was once again represented as giving practical effect to certain Qur'anic verses that had been generally regarded by traditional jurisprudence as moral rather than legally enforceable injunctions – namely, those verses that enjoin husbands to “make a fair provision” for repudiated wives and to “retain wives with kindness or release them with consideration.” The effect of the Syrian law, then, is to subject the husband's motive for repudiation to the scrutiny of the court and to penalize him, albeit to a limited extent, for abuse of his power. Once again, however, the Tunisian *ijtihâd* concerning repudiation is far more radical. Here the reformers argued that the Qur'an orders the appointment of arbitrators in the event of discord between husband and wife. Clearly, a pronouncement of repudiation by a husband indicated a state of discord between the spouses. Just as clearly, the official courts were best suited to undertake the function of arbitration that then becomes necessary according to the Qur'an. It is on this broad basis that the Tunisian law abolishes the right of a husband to repudiate his wife extra judicially and enacts that “*Divorce outside a court of law is without legal effect.*” Although the court must dissolve the marriage if the husband persists in his repudiation, it has an unlimited power to grant the wife compensation for any damages she has sustained from the divorce – although in practice this power has so far been used most sparingly. In regard to polygamy and *talâq*, therefore, Tunisia has, through the reinterpretation of the Qur'an, made reforms hardly less radical than those affected in Turkey some thirty years previously by the adoption of the Swiss Civil Code.

In Pakistan a new interpretation of the Qur'an and the *Sunnah* was declared the basis of the reforms introduced by the Muslim Family Laws Ordinance of 1961, although the provisions of the ordinance in relation to polygamy and *talâq* are much less radical than the corresponding Middle Eastern reforms, since a second marriage is simply made dependent on the consent of an Arbitration Council and the effect of a husband's repudiation is merely suspended for a period of three months to afford opportunity for reconciliation.

Judicial decisions in Pakistan have also unequivocally endorsed the right of the independent interpretation of the Qur'an. For example, in *Khurshîd Bibî v. Muhammad Amîn* (1967) the Supreme Court held that a Muslim wife had the right to obtain a divorce simply by paying suitable compensation to her husband. This decision was based on the court's interpretation of a relevant Qur'anic verse. But under *Shari'ah* law, this form of divorce, known as *khul'*, whereby a wife pays for her release, is a contract between the spouses and, as such, entirely dependent upon the husband's free consent.

These are only a few examples of the many far-reaching changes that have been effected in Islamic family law. But the whole process of legal codification, as it has developed so far still involves great problems of principle and practice. Most Muslims still adamantly reject the validity of the process of reinterpretation of the basic texts of divine revelation. They argue that the texts are merely being manipulated to yield the meaning that suits the preconceived purposes of the reformers and that, therefore, contrary to fundamental Islamic rules, it is social desirability and not the will of Allah that is the ultimate determinant of the law.

As regards the practical effect of legal codification, in many Muslim countries there is a deep social gulf between a Westernized and modernist minority and the conservative mass of the population. Codifications that aim at satisfying the standards of progressive urban society have little significance for the traditionalist communities in rural areas or for the Muslims whose geographical and social distribution crosses all apparent boundaries.²⁵

Having now provided this concise theoretical information, we will now explore the reality in some Muslim countries.

6.3 Anglo-Muhammadan Law (Indo-Muslim law)

Islam is the newest of South Asia's major religions and a highly visible presence in all the countries of the region, in the faith of nearly all the people of Pakistan and Bangladesh, as well as the national religion of the tiny island of Maldives. Muslims also make up important minorities in India, Nepal and Sri Lanka. The vast majority of Muslims in South Asia are Sunnî, holding to the Hanafî school of law, although followers of the Shâfi'î, Mâlikî and Hanbalî schools may also be found, as well as small groups of Shî'a and Ismâ'ilîs.²⁶

Mohammedan (also spelled Muhammadan, Mahommedan, Mahomedan or Mahometan) is a term used both as a noun and an adjective meaning belonging or relating to either the religion of Islam or to that of the Islamic prophet Muhammad. The term is now largely superseded by the terms Muslim, Moslem or Islamic but was commonly used in Western literature until at least the mid-1960s.²⁷ Muslim is used more today than Moslem, and the term Mohammedan is generally considered archaic or in some cases even offensive. The term "Mohammedan" arose because Western

²⁵ Al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid*, vol. I, (Damascus: Dar al-Qalam, 1998), vol. 1, pp. 165-72.

²⁶ 'Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World*, pp. 201-5.

²⁷ See, for instance, the second edition of *A Dictionary of Modern English Usage* by H.W. Fowler, revised by Ernest Gowers (Oxford, 1965).

scholars believe that the source of Islamic Law was not revelation but Muhammad himself. This is completely wrong.²⁸

The term Anglo-Muhammadan Law was applied especially in British colonial courts in India. It included criminal and civil law and was based on an interpretation of Islamic texts and practices. Since the establishment of the British government in India, the books by *Jinâyah* and *Hudûd* on *Fatâwâ al-Âlemgiriyyah* have been translated into Persian. When the attention of the British government in India was first directed to the necessity and importance of procuring some authentic guide for aiding them in their supervision of native judicial matters, they started to codify Islamic law and the *Hidâyah* was translated into Persian too. This book has been translated into English by James Anderson at the request of Warren Hastings of the *Digests of Muhammadan law* in English, the first appears to be the chapter on *Criminal Law of the Muhammadus* as modified by regulations. *The Principles of Islamic Laws*, as in force in India, were laid down by Beaufort in his elaborate *Digest of Criminal Law* for the Presidency of Fort William. *The Principles and Precedents of Muhammadan Law*, written by Sir William Hay Macnagte, is the clearest and easiest. In 1865, Neil Baillie completed a *Digest of Muhammadan Law* on all the subjects to which Muhammadan law was usually applied by the British courts in India.²⁹

But these works have become useless since the promulgation of the Indian Penal Code. The British government encouraged Muslim and Hindus to combine the principles and rules of Muhammadan and Hindu Laws. A comprehensive penal code (1860) ended the application of Islamic Law to criminal law, but it continued to be applied in personal status law until the Muslim Personal Law Application Act (1937).

Let us now briefly summarize the history of the adaptation of Islamic law as Muhammadan Law in India³⁰. The *Sharî'ah* had been common practice in South Asia for centuries under the sultanates, the Mughal Empire and the successor states that arose during the eighteenth century. The decline of the Mughal Empire seems to have stimulated a moral and cultural competition among successor powers that led to an increase in Islamic legal scholarship. Sunnîs, predominantly of the Hanafî school, focused primarily on *al-Hidâyah*, a twelfth-century text of Central Asian origin that relied primarily on Abu-Yusuf and al-Shaybani, the two pupils of Abu-Hanîfa. Innovative

²⁸ Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, pp. 1-2.

²⁹ Shama Churun Sircar, *The Muhammadan Law: A Digest of the Law Applicable Especially to the Sunnîs of India*, (Calcutta: Thacker, Spink and Co., 1873), pp. 56-77.

³⁰ What follows is largely based on Michael R. Anderson, "Islamic Law and the Colonial Encounter in British India," in Chibli Mallat and Jane Frances Connors, *Islamic Family Law* (Leiden: Brill, 1990), pp. 205-23; cf. also Roland Wilson, *A Short History of Modern English Law*, (Place: Rivington's Historical Handbooks, 1874); William Markby, *An Introduction to Hindu and Mahomedan Law for the Use of Students* (Boston: Longwood Press, 1978).

scholars were not lacking, however. Shah Waliyyullah (1703-62) promoted an eclectic approach to the Sunnî schools, and argued for the practice of *Ijtihâd*. But Shi'ite scholarship was also active. Customary law also played a role here. Many communities, under the umbrella of imperial tolerance kept their localized institutions, practices, and norms. Local leaders seem to have settled disputes with varying degrees of deference to textual norms. The British were confronted with the problem of how to obtain reliable and accurate information on indigenous life. To do so, they turned to law and legal institutions, since the "the rule of law", aside from being ideological baggage and an arm of sovereignty, could also be employed as a "proto-sociology" that could guide policy.³¹ The result was, already in the first century of colonial rule the birth of an Anglo-Muhammadan jurisprudence that comprised legal assumptions as well as law officers, translations, textbooks, codifications, and new legal technologies.

The founder of Anglo-Muhammadan Law was Warren Hastings (December 6, 1732-August 22, 1818), the first Governor-General of the Bangal Presidency, from 1773 to 1785. Hastings assumed that indigenous norms could simply be grafted into British-based legal institutions without the integrity of either being significantly compromised. Internal contractions in *Shari'ah* were simply glossed over and it was applied a set of more or less homogenous rules. This entire approach, and Hastings' categorization of everything as either Hindu or Muslim, severely neglected the actual situation in South Asia, ignoring the differences between Shi'ite and Sunnî and the various schools within each, as well as the various different Hindu groups. The application of the Qur'an and more specifically legal texts like *al-Hidâyah* had always depended on a *Qâdhî* of personal moral rectitude and with knowledge of local customs.

A more sophisticated treatment of textual sources soon developed, but one that gave priority to text over actual practice. Before Anglo-Muhammadan law was codified, British judges could consult court-appointed *mawlawis*, presenting them with an abstract, hypothetical case. The *mawlawi* would then issue a *fatwâ*, also abstract, to apply to the case. The *mawlawis* were dispensed with in 1864, and thus the official administration of Anglo-Muhammadan law was cut off from men of moral rectitude.

Translation of Original Islamic Law Texts. The priority of texts and the distrust of native law officers make it obvious that Islamic texts in English were eagerly awaited so that British judges could apply the law directly. Hastings was asked to compile "*a complete Digest of Hindu and Muhammad laws after the model of Justinian's inestimable Pandects.*" Hastings insisted *al-Hidâyah*, be translated by three *mawlawis* from Arabic into Persian, and then into English by Charles Hamilton in 1791. Because *al-Hidâyah* did not treat inheritance in detailed, which the British saw as the most intrac-

³¹ See: M. Anderson, "Islamic Law and the Colonial Encounter in British India," in C. Mallat and J. Conners (Eds.), *Islamic Family Law*, (London: Groham and Trotman, 1990), pp. 205-24.

table and politically important subject in Muhammadan law, *Al-Sirâjiyyah*, a treatise on inheritance, was translated in 1792 directly from the Arabic by Sir William Jones personally.

These translations' primary significance lay initially not in their impact on colonial administration but in promoting a view of Islam as essentialist, static and incapable of change from within. Their legal influence increased when judges started to rely on them more directly. A plan to translate a broader range of texts, including non-Hanafi texts, was never completed and finally canceled because of financial problems in 1808. There was only one additional major translation in the 19th century: a shortened version *Alamgiri* and a portion of an Ithnâ 'Ash'ariya (Shi'ite) text, translated by Neil Baillie and published in 1865 as *A Digest of Mohummudan Law*.

Although these three translations formed the textual basis for Anglo-Muhammadan law, they were rife with inadequacies and errors. These errors were partly recorded in court cases and commentaries, but there has been no investigation of their ideological biases. A basic text on the *usûl al-fiqh*, basic to any detailed understanding of Islamic law, did not appear until 1911. Thus it could only be expected that these texts would not be viewed as what they in fact were, i.e. parts of a larger scholarly debate but rather as authoritative codes.

Legal Texts. The textual basis of Anglo-Muhammadan law increasingly became a matter of compilations of materials ordered in a thematic way. W.H. Macnaghten compiled the earliest of these, a collection of a number of *fatwâ* produced by the court *Qâdhîs* that he published in 1825 as *Principles and Precedents of Muhammadan Law*. This work included his own generalizations, while claiming that it was an authoritative treatment of opinion on various subjects. Instead, he glossed over problematic areas and neglected genuine differences in doctrine. In the years following, the text books issued by the colonial administration discussed their subject with varying degrees of competence, but Macnaghten's book remained the basic model. This approach minimized doctrinal differences and portrayed *Sharî'ah* as something it was not: "a fixed body of immutable rules beyond the realm of interpretation and judicial discretion."³²

Customary law. British administrators began to emphasize custom as a source of law in the latter half of the nineteenth century, and after the Punjab Laws Act of 1872 revenue collectors in the Punjab were to gather information concerning customs in each village. Although this emphasis on custom remained strongest in the Punjab, it did lead to a reconsideration of legal administration across India. Although the British law custom as ancient and stable in a static society, in truth what the British called "customary law" was not compatible at all with the notion of codification.

³² See Anderson, "Islamic Law and the Colonial Encounter in British India," pp. 205-24.

The determination of the content, validity, and applicability of custom was subject to a number of tests. Customs, in order to be legally binding, had to be enforceable, reasonable, and to have existed from time immemorial. Those that were viewed as immoral, illegal according to general legal principles or contrary to public policy could not be enforced.

In summary, the colonial administration was always marked by deference to indigenous family laws. Nonetheless, the latent contradictions of a non-Muslim government administering a Muslim law was always present, throwing up repeated cases of misunderstanding. There was a great deal of variety in the legal norms and institutions. The British relied on translations, text books and codifications, developing, as a result of financial constraints and limited scholarship, a legal system that could satisfy the indigenous elites and collect revenue. Anglo-Muhammadan Law ended up being a matter of certainty and uniformity than one of accuracy.

Anglo-Muhammadan jurisprudence revolved around the belief that Islam was a matter of religious rules, more or less inflexible, that applied to all Muslims everywhere. The internal contradictions, genuine differences and nuances regarding *Sharī'ah* norms were, in general, displaced by a legalistic legal system.³³

6.3.1 *Islamic Law in India*

India is a republic in the Asian subcontinent in southern Asia; second most populous country in the world; achieved independence from the United Kingdom in 1947. The Indian legal system is based in part on the English common law system. With respect to Muslim personal law as applied in India, the sources of law are Hanafī *fiqh* along with some recourse to other schools, legislation, precedent, certain juridical texts (both classical and modern) that are considered authoritative and customary.

During the British Raj, the colonial courts were directed, as we saw above, to apply “indigenous legal norms” in matters relating to family law and religion, with “native law officers” advising the courts on the determination of those norms. A number of Hanafī sources (notably *al-Hidāyah* and the *Fatāwā al-Ālemgiriyyah*) were translated into English. The advisory positions of legal experts on Hindu and Muslim law were abolished in 1864. Legal commentators on the development of the indigenous system of Anglo-Muhammadan law (now more commonly referred to as Indo-Muslim law) attach varying degrees of significance to the subsequently authoritative position of these works (and the quality of the translations), the absence of judicial expertise

³³ Cf. Sir Roland Knyvet Wilson and Abdullah Yusuf Ali, *Anglo-Muhammadan Law: A Digest*, (India: Thacker, 1930); Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan*, (England: Ashgate Publishing, 1971), pp. 126-32.

in Muslim law, the introduction of principles of English law and procedure through judges trained in the English legal tradition and through interpretation of the residual formula of justice and right or justice, equity and good conscience to imply mainly English law, and to the position taken on customary law.³⁴

The status of the personal laws of minority communities and the plurality of religious laws in general is much debated in India. Article 44 of the Constitution legislates a commitment to the gradual establishment of legal uniformity in India, the aim being that the state "shall endeavor to secure for the citizens a uniform civil code throughout the territory of India." This directive is considered a threat by elements of religious minority communities who continue to be governed by their own personal laws in family matters, as applied within the superstructure of the Indian legal system.

The predominant *madhhab* is the Hanafî, with sizeable Shâfi'î, Ja'farî and Isma'îli minorities. India's minority religious communities also include Sikhs, Jains, Buddhists, Christians and Jews.

The Indian constitution was adopted on 26 November 1949 and has been amended many times. The preamble of the constitution affirms that India is a "sovereign socialist secular democratic republic." India's secularity is framed in terms of neither favoring nor officially adopting any particular religion, and Article 26 guarantees the freedom to manage religious affairs (subject to constraints imposed by the requirements of public order, morality and health) for every recognized religious denomination or sect. The aforementioned Article 44 of the Constitution contains the Directive Provision stating that Indian legislators shall aim to establish a uniform civil code throughout India. For the time being, religious communities continue to be governed by their own personal laws (apart from Muslims, this applies to Christians, Zoroastrians, Jews and Hindus as well as Buddhists and Sikhs who, for legal purposes, are classified as Hindus). Although the option of civil marriage exists, it is not often the only type of wedding for Indians. The difficulty of reconciling the secularity of the Republic and the objective of establishing legal uniformity with the protection of minority rights (also enshrined in the constitution) has meant that, almost fifty years since the adoption of the constitution, the goal of the directive principle in Article 44 is still far from being realized.

Muslim personal law is applied by the regular *court system*. Since the majority of Muslims are Hanafî, the courts presume that the litigants are Hanafî unless established otherwise.

There are four levels of courts in the judiciary. The first are civil courts with jurisdiction over arbitration, marriage and divorce, guardianship, probate, etc. The next

³⁴ 'Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World*, pp. 220-1.

level of courts is established in the subdivisions of each state, at the district level. Each district falls under the jurisdiction of a principal district civil court presided over by a district judge. There are State High Courts in each of the eighteen states of the federation. The Supreme Court is constituted by one chief justice and not more than seventeen judges.

The courts of first instance for personal status are generally the family courts, organized under the Family Courts Act of 1984. These courts are deemed to be the equivalent of any district or subordinate civil court. Their jurisdiction is enumerated in the Act and covers suits for decrees of nullity, restitution of conjugal rights, judicial separation or dissolution, validity of marriage, matrimonial property, orders or injunctions arising out of the circumstances of marriage, legitimacy, maintenance, guardianship, custody and access to minors. These courts have some criminal jurisdiction in terms of maintenance orders. Suits in these courts may be held *in camera* if the family court so desires or at the request of the parties to the case.³⁵

6.3.2 *Islamic Law in Pakistan*

Islamic Republic of Pakistan is a Muslim republic that occupies the heartland of ancient south Asian civilization in the Indus River valley; formerly part of India; achieved independence from the United Kingdom in 1947. Islam is the official religion of the Islamic Republic of Pakistan. The 1998 census found that 96% of the total population were Muslims, and in 2007 96% (Sunnî 76%, Shi'î 20%). The estimated population of Muslims in Pakistan in 2008 was 169,800,000. Pakistan has the second largest Muslim population in the world, after Indonesia.

The predominant *madhhab* is the Hanafî, and there are sizeable Jafari and Isma'ili minorities. The legal status of the Ahmadîs is somewhat unclear. They identify themselves as Sunnî Muslims but were declared non-Muslims by the state. In 1974 then Prime Minister Zulfikar 'Ali Bhutto finally conceded to a long-standing campaign waged by conservative religious elements agitating for the official designation of Ahmadîs as non-Muslims. There have been Ahmadi initiatives to adopt a modified version of the Muslim Family Laws Ordinance 1961 to be applied to Ahmadi personal status cases. Christian, Zoroastrian, Hindu, Sikh and Jewish minorities are also found in

³⁵ Abdullahi Ahmad An-Na'im, *Islamic Family Law in a Changing World*, pp. 220-45; Tahir Mahmood, *Statute Law Relating to Muslims in India: A Study in Constitutional and Islamic Perspectives* (New Delhi: India and Islam Research Council, 1995); Taha Mahmood, "India" in: *Statutes of Personal Law in Islamic Countries*, 2nd ed. (New Delhi: India and Islam Research Council, 1995); pp. 87-88, 224-29; Anees Ahmed, "Reforming Muslim Personal Law," *Economic and Political Weekly* 36/8 (24 February, 2 March, 2001): 618-19; Anderson, *Islamic Law and the Colonial Encounter in British India*, pp. 205-23.

Pakistan.

The legal system is based on English common law, with provisions to accommodate Pakistan's status as an Islamic state, most notably in the area of personal status but also to some extent in the areas of criminal and commercial law.

After the partition of India in 1947, legislation relating to Muslim family law introduced in British India continued to govern personal status. A seven-member Commission on Marriage and Family Laws was established in 1955 with a remit to consider the personal status laws applicable in the new state and to determine the areas needing reform. The Commission submitted its report in 1956, suggesting a number of reforms, including, for example, the consideration of all triple *talâqs* (except for the third of three) as single, revocable repudiations. The report led to much debate, with many leading 'ulamâ (including *Mawlânâ Abu al'Alâ Mawdudî*, leader of the *Jamâ'at-i-Islamî*) opposing its recommendations.

The Muslim Family Laws Ordinance 1961 adopted some of the provisions of the Report of the Marriage and Family Laws Commission, aiming to reform divorce law and inheritance law relating to orphaned grandchildren, introduce compulsory marriage registration, place restrictions on the practice of polygamy, and reform the law relating to dowries and maintenance in marriage and divorce, as well as amend existing legislation with relation to marriageable age. Again, various sectors of the 'ulamâ regarded this as an unjustified interference or tampering with classical law. When the first constitution of Pakistan was finally promulgated in 1956, it included a provision that came to be known as the repugnancy clause. This clause stated that no law repugnant to Islamic injunctions would be enacted and that all existing laws would be considered in light of this provision in order to institute appropriate amendments. This repugnancy provision has been retained and actually strengthened in the succeeding constitutions.

After a military takeover in 1999 the constitution was again suspended, and in 2000 discussions continued about possible amendments to it. The third constitution was adopted on 10 April 1973, suspended in 1977, and reinstituted in 1985. It has undergone numerous amendments over time, being suspended again in 1999 and still in that state at the time of writing.

Article 1 of the constitution declares that Pakistan will be known as "the Islamic Republic of Pakistan" and Article 2 declares Islam to be the state religion. In 1985 the Objectives Resolution contained in the preamble of the constitution was made a substantive provision by the insertion of Article 2A, thereby requiring all laws to be brought into consonance with the Qur'an and the *Sunnah*. Chapter 3A established the Federal *Sharî'ah* Court and stipulates that the Court will examine any law or provision that may be repugnant to the "injunctions of Islam, as laid down in the Holy Qur'an

and the *Sunnah*.” If a law or provision is determined to be repugnant, the Court is to provide notice to the federal or provincial government, specifying the reasons for the decision. The Court may also examine any decisions relating to the application of the *hudud* penalties that have been decided by any criminal court, and may suspend the sentence if there is any question as to the correctness, legality or propriety of any finding, sentence or order or the regularity of the proceedings. The Supreme Court also has a Shari’ah Appellate Bench empowered to review the decisions of the Federal Shari’ah Court and consists of three Muslim Supreme Court judges and up to two *ulamâ*. Part IX of the constitution is called Islamic Provisions and provides for the Islamization of all existing laws, reiterating that no laws will be enacted that are repugnant to the injunctions of Islam. An explanation appended to Part IX clarifies that, with respect to personal law, the expression “Qur’an and the *Sunnah*” means the laws of any sect as interpreted by that sect.

The Islamic provisions also provide for the creation of an Islamic Ideology Council of eight to twenty members appointed by the president. They must have “knowledge of the principles and philosophy of Islam as enunciated in the Holy Qur’an and *Sunnah*, or understanding of the economic, political, legal or administrative problems of Pakistan.” The Islamic Council is meant to represent various schools of thought as far as that may be practical, and at least one woman should be appointed. Its function is to make recommendations to the *Majlis-i-Shûrâ* (Parliament) and the Provincial Assemblies “as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Qur’an and *Sunnah*.” The Council also determines for the federal and provincial governments if proposed laws are repugnant, and compiles “such Injunctions of Islam as can be given legislative effect” for them in suitable form.

The judiciary is composed of three levels of federal courts, three divisions of lower courts and a *Supreme Judicial Council*. There are district courts in every district of each province, having both civil and criminal jurisdiction, although they deal mainly with civil matters. The High Court of each province has jurisdiction over civil and criminal appeals from the lower courts in the provinces. The Supreme Court is in Islamabad and has exclusive jurisdiction over disputes between or among federal and provincial governments and appellate jurisdiction over High Court decisions. There is also a Federal Shari’ah Court established by Presidential Order on 26 May 1980. This court has exclusive jurisdiction to determine, upon petition by any citizen or the federal or provincial governments or on its own motion, if a law conforms to the injunctions of Islam. An Islamic advisory council of *ulamâ* assists the Federal Shari’ah Court in this capacity.

The *West Pakistan Family Courts Act 1964* continues to govern the jurisdiction

and functioning of the Pakistani Family Courts; the Act was never applied to East Pakistan before Bangladeshi independence. Appeals from the Family Courts lie with the High Court only. The Family Courts have exclusive jurisdiction over matters pertaining to the dissolution of marriage, dowries, financial support, the restitution of conjugal rights, the custody of children, and guardianship.

The Pakistan Penal Code or PPC is the basis for all legislation in Pakistan. It was instituted in 1860 by the British colonial government. It is similar in sections to the Indian Penal Code but is more religiously oriented. The Penal Code has been amended several times since the independence of Pakistan.

On 2 December 1978 General Muhammad Zia-ul-Haq delivered a nationwide address on the occasion of the first day of the Hijra calendar. He did this to usher in an Islamic system in Pakistan. In the speech he accused politicians of exploiting the name of Islam, saying that many rulers did what they pleased in the name of Islam.

After assuming power, the government took up its task of public commitment to the enforcement of *Nizâm-e-Mustafa* (the Islamic System). This was a 180-degree turn from Pakistan's predominantly Anglo-Saxon Law. As a preliminary measure to establish an Islamic society in Pakistan, General Zia announced the establishment of *Shari'ah* Benches. Speaking about the jurisdiction of the *Shari'ah Benches*, he said, "Every citizen will have the right to present any law enforced by the government before the '*Shari'ah* Bench' and obtain its verdict whether the law is wholly or partly Islamic or un-Islamic."

But General Zia did not mention that the *Shari'ah Benches'* jurisdiction was curtailed by the following overriding clause: "(Any) law that does not include the constitution, Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of three years, any fiscal law, or any law relating to the collection of taxes and fees or insurance practice and procedure." It meant that all the important laws that affect each and every individual directly remained outside the purview of the *Shari'ah Benches*. However, the limited *Shari'ah Benches* did not produce smooth sailing. The Federal *Shari'ah Bench* declared *rajm*, or stoning, to be un-Islamic; Ziaul Haq reconstituted the court, which then declared *rajm* to be Islamic.

Some laws that have been accepted in Pakistan according to *Shari'ah* Law:

- Guardians and Wards Act 1890
- Child Marriage Restraint Act 1929
- Dissolution of Muslim Marriages Act 1939
- Muslim Family Law Ordinance 1961
- (West Pakistan Muslim personal law (*Shari'ah*) Application Act 1962
- (West Pakistan) Family Courts Act 1964

- Dowry and Bridal Gifts (Restriction) Act 1976
- Prohibition (Enforcement of *Hudûd*) Order 1979
- Offence of *Qadhif* (Enforcement of *Hudûd*) Order 1979
- Offence of *Zinâ* (Enforcement of *Hudûd*) Ordinance 1979
- The *Zakâh* and '*Ushr* Ordinance promulgated on 20 June, 1980
- The *Zinâ* Ordinance in 1981
- Law of Evidence (*Qânûn-e-Shahadat*) Order 1984
- The *Qisâs* and *Diyât* Ordinance in 1990
- Enforcement of *Sharî'ah* Act 1991.³⁶

6.3.3 *Islamic Law in Bangladesh*

People's Republic of Bangladesh is a Muslim republic in southern Asia bordered by India to the north and west and east and the Bay of Bengal to the south; formerly part of India and then part of Pakistan; it achieved independence in 1971. Following independence, the British-era legislation that had continued to be applied in Pakistan, as well as the post-1947 legislation enacted by Pakistan, remained the basis of Bangladeshi personal status laws. Pearl and Menski state that legal developments in Bangladesh and Pakistan since 1972 have been quite distinct. The prospect of a Uniform Family Code has been a subject attracting much lobbying by women's groups in Bangladesh, but there is no equivalent to India's constitutional directive regarding a Uniform Civil Code. The Hanafi school is the predominant *madhhab* in Bangladesh. There are also Hindu and Christian minorities.

The Constitution was adopted on 4 November 1972. An amendment to the Constitution under President Ziaur Rahman in 1977 removed the principle of secularism that had been enshrined in Part II, Fundamental State Policy, replacing it with "absolute trust and faith in Almighty Allah." The Eighth Amendment of 1988 inserted Article 2A, affirming that "[t]he state religion of the Republic is Islam, but other religions may be practiced in peace and harmony in the republic." Some women's groups challenged this move on the grounds that it risked exposing women to discriminatory laws.

At the same time, state law in South Asia has always afforded recognition to and left a sphere for the application of the family laws of different religious communities.

³⁶ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 229-37; Ahmed, "Reforming Muslim Personal Law," pp. 618-19; Rubya Mehdi, *The Islamization of the Law in Pakistan* (Richmond: 1994); Taha Mahmood, "Pakistan," in: *Statutes of Personal Law in Islamic Countries*, pp. 91. 234-40.

The constitutional protection of women's rights and the assertion of gender equality come under the Fundamental Principles of State Policy and is enshrined in Article 10 on the participation of women in national life as well as in Articles 26 to 29 of the section on Fundamental Rights affirming equality of all citizens before the law. This is balanced against the Constitutional protection of minority rights provided in Article 41 on freedom of religion and the freedom of every religious community or denomination to establish, manage and maintain its religious institutions (subject to law, public order and morality). This affects the significant Hindu minority in Bangladesh (roughly equivalent in proportion to India's Muslim minority) in addition to Christian and Buddhist minorities.

The judiciary is organized at two levels, with subordinate courts and a Supreme Court with Appellate and High Court Divisions. The Family Courts Ordinance 1985 governs the application of the personal laws of all Bangladeshis through the state judiciary by the creation of Family Courts. The Family Courts have jurisdiction over personal status cases of all communities, though religious minorities are governed by their own personal laws. The Family Courts are convened in Assistant Judges' Courts and have special procedures and reduced formalities. The Family Courts may hear suits in chambers at the request of both parties, and the court fees are nominal, but lawyers' and notaries' fees considerably increase the costs associated with going to court. Under the terms of the Ordinance, Family Courts have exclusive jurisdiction to try and dispose of suits relating to the dissolution of marriage, the restitution of conjugal rights, dower, maintenance, and guardianship and custody.

The jurisdiction of the Family Courts is restricted so that if any criminal offence arises in the context of a civil case, it comes under the jurisdiction of Criminal or Magistrates Courts. This has created some inconsistencies within the legal system with Magistrates still hearing maintenance claims under section 488 of the Criminal Procedure Code while Family Courts are supposed to retain exclusive jurisdiction to try and determine maintenance cases. The Bangladeshi legislation relating to family courts is quite similar to the legislation applicable in Pakistan; however, the Pakistani Family Courts have broader jurisdiction extending beyond civil suits.

As elsewhere in South Asia, much of the Muslim personal law is unlegislated, the basis for the law being classical Hanafi *fiqh* except where this has been amended by legislation.

The Muslim personal law (Shari'at) Application Act 1937 continues to govern the application of Muslim family law in Bangladesh. (The pre-independence legislation that replaced this Act in 1962 applied only to West Pakistan.) According to the Act, Bangladeshis are subject to local custom and usage in matters relating to wills, legacies or adoption, unless a person declares his or her express preference for being go-

verned by Islamic law. Thus, estates may validly devolve in proportions favouring women under customary law.

The Bangladeshi Muslim Family Laws Ordinance, based on the Pakistani MFLO of 1961, has incorporated some amendments to the original legislation. There are administrative differences in terms of the governmental bodies that apply the provisions of the MFLO at the local level. Applications, appeals and conciliation procedures go to the Union Parishad, Pourashava or Municipal Corporation. This includes the application process for contracting polygamous marriages, the application process itself remaining the same (i.e., requiring the reasons for wanting to contract a polygamous marriage and certification attesting to the existing wife's or wives' consent).

Since there are detailed rules for the division of estates according to classical law, there is little legislation in this area. In general, property devolves upon the heirs according to Hanafi or Ja'fari rules of succession. The Muslim Family Laws Ordinance 1961 also introduced obligatory bequests in favor of orphaned grandchildren, allowing them to inherit from their maternal or paternal grandparents in place of their deceased mothers or fathers.³⁷

6.4 Islamic Law in Southeast Asia: *Syariah* or Anglo-Muhammadan Law

Southeast Asia encompasses the huge peninsula of Indochina and the East Indies. In this region lie the states of Burma, Brunei Darussalam, Thailand, Laos, Cambodia, Vietnam, Malaysia, Singapore, Indonesia and the Philippines. Islam is the religion of two-fifths of the region's people, most of them living in the Malay Peninsula and the Malay Archipelago, and on the Philippine island of Mindanao. Indonesia is the single largest Muslim country in the world, with a population of 250 million. Two-thirds of Malaysia's 23 million is Muslim. The first converts to Islam were local rulers. In general, Muslim communities in Southeast Asia are mainly Sunni Muslims of the Shafi'i school with vestiges of Sufi influence in religious ceremonies.³⁸

Syariah, *syari'ah*, *syariat*, *syari'at* means Islamic law. It may appear strange to scholars of classical Islam to conflate "originality" and *syariah*. But this conflation does not deny the universality of Islam nor does it question revelation. All it says is that in Indonesia and Malaysia the *syariah* is now expressed in forms that are particular to these places for the Muslims of these two countries. These forms of expression origi-

³⁷ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 214-19.

³⁸ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 245-48.

nated in Southeast Asia.³⁹

For all of the 19th and 20th centuries the originalities of Southeast Asian Islam have been ignored, underplayed or dismissed by Europeans. The reason is obvious. The British and the Dutch were in charge, not just politically, economically and military but intellectually as well. They set the agenda as to what Islam was and how it was to be formulated. It was thus possible to claim in early 20th-century British Malaya that "Islam has destroyed classical Malay culture," and, in the Dutch East Indies, that Indonesians are only "nominal Muslims." It was perceptions such as these that allowed, even made necessary, the reformulations of *syariah*. The result for contemporary *syariah* is its compression into the forms of code, statute and precedent derived from Europe.

Islam in what are now Indonesia, Malaysia and the southern Philippines, dates from the 15th century. It has left an extensive legacy in literature, philosophy and law. The *ummah* is one, but the expression of the faith is culturally defined. 19th-century European scholars, in the age of high imperialism, saw the material as a corruption of the "pure" Islamic Law. The reason is obvious: while the texts do certainly contain elements of Islamic Law, they also contain indigenous rules. This was thought to be a "corruption" of the classical heritage. This idea of corruption has persisted into the colonial and contemporary eras, with sometimes unfortunate results.⁴⁰

A good example is the Malayan law text, *Undang-Undang Melak* which dates from the 17th century and was the most influential text for the succeeding two centuries. The text is short and contains three parts that deal with debt and debt bondage, marriage and divorce and property rights respectively. The first and the last represent local custom (*adat*) while marriage and divorce are recognizably derived from Islamic Law. Perhaps most interesting is an interpolated section that classifies the sources of law as (a) reason, (b) Islam and (c) customs of the country. A diversity of sources is recognized and, where there is conflict or inconsistency, the Islamic element is ranked lower than the other two. The evidence from this text and other later Malay-Muslim texts is that Islam was not the only source for law in the Muslim sultanates.

By the end of the 18th century there was a corpus of "Muslim" texts, produced in and for the royal courts that define sovereignty, rule and state. We would now call these "public order" or "public law" texts. In the earlier texts God's revealed message is subordinated to Islam used as a definition of sovereignty.

The Colonial Reformulation of Islamic Law. The success of European legal imperialism is nowhere demonstrated more clearly than in Dutch and British possessions in

³⁹ M.B. Hooker, "Introduction: Islamic Law in South-east Asia," *Asian Law*, vol. 4, No: 3 (Australia: The Federation Press, 2002), pp. 213-31.

⁴⁰ Cf. Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 245-9.

Southeast Asia. Within two decades for the British, and slightly longer for the Dutch, Islam was reduced to a personal religion and confined to family law. How did this happen? The answer lies in the time (1800 to 1945) and the legal policies adopted by the colonial rulers. The consequence of these imperial policies remain alive and well into the 21st century. They still form foundations for Islamic law in contemporary Indonesia and Malaysia.⁴¹

1. *British Colonial Law.* From the late 18th century on colonial legal policy rested on the following principle (Act of Settlement, 1781): English law is the law of general application, subject to the religions, manners and cultures of the natives, provided these exceptions are not repugnant to justice, equity and good conscience.

Even a cursory reading of this passage indicates its very restrictive nature, and the judicial precedent developed throughout the 19th and 20th centuries confirms this. "Religions, manners and customs" come to be defined as family law and charitable trusts, and even within this narrow definition certain practices, valid in religion, were either restricted or forbidden under the "justice, equity and good conscience" provision (for example, child marriage and aspects of charitable trusts).

But there was an even more fundamental change occurring. This was the re-formulation of *syariah* into English legal terms. Those principles of *syariah* permitted to exist now became described in precedent and their validity and meaning was decided following English legal reasoning. A new hybrid law was developed, the Anglo-Muhammadan or Anglo-Muslim law. (The same thing happened with the Anglo-Hindu, Burmese-Buddhist, Anglo-Chinese, and Malay-*Adat* laws.) The English judicial method absorbed the few principles of *syariah* permitted to continue and, by the late 19th century, the new hybrid had taken on a life of its own. It is not fanciful to suggest that the classical *syariah* is not the operative law and has not been that since the colonial period. "Islamic Law" is actually Anglo-Muslim law, i.e. the law that the state makes applicable to Muslims.⁴²

2. *Dutch Colonial Law.* The Dutch also marginalized the classical *syariah*, although it did so by a different method. From the 1850s on it became a settled principle of Dutch colonial legal policy that each racial group should have its own law, applied only to members of that group. There were separate legal universes. Dutch law applied to Europeans or any persons assimilated to that status. *Adat* (custom) applied to natives. The *syariah* as such had no formal status, except to the degree or extent permitted by any of the *adat* laws. Its status was dependent on recognition by *adat*, that is, its "reception" into *adat* law. This so-called "reception theory" has since dominated the administration of Islamic Law in Indonesia.

⁴¹ Hooker, *Introduction*, pp. 213-19.

⁴² Hooker, *Introduction*, pp. 213-19.

Within a few years, the Dutch colonial system of separate laws based on race began to break down, and even the invention of special conflict of laws rules (*hukum antargolongan*) to resolve differences proved a failure. To propose strict divisions based on race is not, in fact, a practical proposition. People from different law groups marry and contract across racial lines. An additional complicating factor was the success of the Christian missionary efforts by the end of the 19th century, creating a new class: the “Christian Native.”

For the Muslims in the Dutch East Indies, however, the 19th-century Islamic reform movements, derived initially from the Middle East, exacerbated the legal uncertainties of religion vis-à-vis *adat* laws. To this chaotic pluralism we must also add the effect of Dutch legal scholarship (i.e. from 1870–1940), which was concerned to restate the indigenous laws of the Dutch East Indies in a form suitable for colonial administration. This involved the selection and redrafting of rules to make them consonant with legal pluralism and suitable for the newly emerging colonial economy. These are the contexts for *syariah*, to which we now turn.

From the point of view of the colonial administration, the effective day-to-day law for the Muslim population was *adat*, which might or might not include reference to Islam. In fact the Islamic reference was much wider than was first thought, particularly in the area of family law. The response, therefore, was to establish a “Priest Court” (*Priesteraad*) in 1882 for Java and Madura with jurisdiction in marriage, divorce, inheritance and trusts (*waqf*). The judges were Muslims with some recognizable expertise, but the courts had only limited powers to enforce their own judgments. It does not appear not to have worked satisfactorily, and in 1937 a new Regulation on Religious Justice was enacted. This dealt largely with procedure, then as now a real difficulty; however, it also reduced jurisdiction, confining it to marriage and divorce. Most importantly, the enforcement of decisions (except in dowries, financial support and expenses) was a matter left to the secular (*Landraad*) courts. These courts might, and apparently often did, refuse enforcement, especially where immovable property was at stake.

Looking back from the perspective of a century, we can see that the response to the legal implications of Islam was to control and limit *syariah* while at the same time allowing it a minimal presence in a bureaucratic form. The religious courts were in fact executive institutions: the classical *syariah* was little, if at all, evident as a working system of religious jurisprudence.⁴³

The Syariah Court system is one of the two separate systems of courts that exist in the Southeast Asian legal system. *Syariah* refers to *Shari’ah* law in Islamic religious law and deals with exclusively Islamic laws, having jurisdiction over every Muslim in

⁴³ Hooker, *Introduction*, pp. 213–19.

Southeast Asia. The Syariah Court was also established by the Singapore government. The Select Committee was made up of lawyers, *Qâdhîs* and local religious leaders. As a result of a study, an act known as the Muslims' Ordinance came into effect on 30 May 1957, from which the Syariah Court derived its authority until 1966. In 1966 the Administration of Muslim Law Act (AMLA) was introduced, repealing the Muslims' Ordinance. This act was created to enhance the system of administration governing the Muslims in Singapore.

We can thus say that this was the reformulation of *syariah* into English legal terms. Those *syariah* principles permitted to exist now became described in precedent and their validity and meaning was decided on the basis of English legal reasoning. A new hybrid law was developed, the *Anglo-Muhammadan* or *Anglo-Muslim* law. (The same thing happened with the *Anglo-Hindu*, *Burmese-Buddhism*, *Anglo-Chinese*, and *Malay-Adat* laws.) The English judicial method absorbed the few principles of *syariah* that were permitted to continue and, by the late 19th century, the new hybrid had taken on a life of its own. If one wished to know what "Islamic" law was in British India or British Malaya, then one had to look to precedents. It was certainly not necessary to refer to the classic Islamic texts. One can even find cases at the highest level that actually reject classic Arabic texts if acceptance would have meant overturning existing local precedent. By 1900 a classically trained Islamic jurist would have been at a complete loss with this Anglo-Muslim law. At the same time, however, a common lawyer with no knowledge of Islam would have been perfectly comfortable with them.

6.4.1 *Islamic Law in Indonesia*

The Republic of Indonesia is a country in Southeast Asia. Comprising 17,508 islands, it is the world's largest archipelagic state. With a population of 222 million people in 2006, it is the world's fourth most populous country and the most populous Muslim-majority nation. However, no reference is made to Islam in the Indonesian constitution. Indonesia is a republic with an elected legislature and president. The nation's capital city is Jakarta.⁴⁴

The Republic of Indonesia underwent a bitter and bloody struggle for independence and one of its first acts was to establish a Ministry of Religion in 1946. For the first time Islam had a formal presence in the modern state.

Islamic political parties were also founded but the Republic of Indonesia was not an Islamic state; it was a secular state – as it remains today – with a constitution mod-

⁴⁴ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 263-7; Zaid, *Reformation of Islamic Thought*, p. 19.

eled on those of Europe. The promulgation of that constitution in 1945 was not, however, uncontested. An intense debate was carried on between secular nationalists and those who advocated that Islam, in some way, be the foundation of the independent republic for which all were struggling.

A Ministry of Religion was established in 1946, thus giving Islam a formal bureaucratic presence for the first time. In addition, overtly Muslim political parties were permitted (political activity in religious terms was, of course, proscribed in the colonial period). These were considerable gains for Islam, but, on the other hand, the colonial regime of religious courts, with a severely restricted jurisdiction, continued and was extended in 1957 to all parts of the newly independent republic. These courts, the *Pengadilan Agama*, were under the jurisdiction of the Ministry of Religion, which was at odds with the Indonesian Supreme Court (*Mahkama Agung*) (and thus the Ministry of Justice) on this matter, a tension which has still not been resolved.

The religious court system underwent significant changes in 1989 with the promulgation of a new Law on Religious Justice (No 7/1989). The greater part of this statute is concerned with establishing procedural matters; these include staffing, forms for administration, costs and so on. For the rest, jurisdiction is the main subject, and in many ways this repeats the Dutch and later post-independence laws. Essentially, the religious courts are family law courts and the main subject is divorce and property settlement arising out of divorce. There is a useful survey of Islamic law administration in the New Order government by Cammack (1989) up to the mid-1980s. This has material on courts and judges and also deals with family law.

The second significant change occurred in 1991 with the publication of the Compilation of Islamic Law (*Kompilasi*) by presidential instruction. It is a code of law for the religious courts, although it describes itself as a "guide." It sets out the basic sources of law and then follows these with a summary version of the classical law on marriage, inheritance and trusts.⁴⁵

We could say that the *Indonesian legal system* is based on Roman-Dutch law, modified by custom and Islamic law. The sources of law are Islamic law, statutory legislation, presidential instructions and official compilations of Islamic law. The majority of the population is Shāfiʿī Muslim, and there are also Ahmadi minorities. The other recognized religious minorities are Roman Catholic, Protestant, Hindu and Buddhist. There are also significant minorities of adherents of tribal religions; they are not afforded any official recognition.

European explorers arrived in the region in the 16th century, and the Dutch East India Company was founded in 1602. The Dutch established a trading post on the

⁴⁵ Abdullahi Ahmad an-Naʿīm, *Islamic Family Law in a Changing World*, pp. 263-67; Hooker, *Introduction*, pp. 219-21.

north coast of Java, later named Jakarta. The Dutch gradually asserted political and military control beyond Java from the 18th century until most of archipelago was under Dutch rule by the start of the 20th century.

Under Dutch rule, the Dutch East Indies' population was divided into Europeans, Natives, and Foreign Orientals. The Dutch established separate tribunals for Europeans and Natives. Indonesians were subject to *adat* law, with the Dutch East Indies divided into several jurisdictions based on cultural and linguistic criteria. Dutch scholars identified and classified nineteen different systems of customary law in the region. In areas under direct rule there were European courts, native courts and general courts for all of the population. In areas under indirect rule, there were native courts applying *adat* with very limited criminal jurisdiction and no jurisdiction over Europeans or foreigners. The basic principle was dominance of the received civil law system, and application of *adat* for natives as far as it was not replaced by statute.

The first legislation relating to the application of Islamic law was an 1882 Royal Decree establishing a Priest Court for Java and Madura, although the decree acknowledged that most Indonesians were also subject to *adat* law administered by native courts. The Priest Court had jurisdiction over Muslim family and inheritance law where all parties were Muslim and *awqâf* and had concurrent jurisdiction with the native courts of Java and Madura. The Priest Court was composed of a president selected from the native courts' officers and three to eight *Qâdhîs*, all appointed by the governor-general. Subsequent legislation by Dutch authorities was also of a largely regulatory and administrative nature. Independence was declared two days after the Japanese occupying forces withdrew in 1945. Calls for the reform of marriage laws led to various proposals from members of government, women's groups and the National Institute for Law Reform from 1945 to 1973, but conflicting interests prevented any consensus being reached. The only statutory reform regarding Muslim personal status in that period was the enactment of the Muslim Marriage and Divorce Registration Law 1946 requiring registration. A new marriage law, the first that was applicable to all Indonesians, was eventually passed in 1974 amid much controversy, particularly with regard to such issues as permission for divorce and polygamy. Some compromises made by the government included increasing the jurisdiction of *Shari'ah* courts and eliminating registration as a requirement for the validity of a marriage. The marriage law is applied by the regular court system to religious minorities and by *Shari'ah* courts to Muslim Indonesians.⁴⁶

Following the controversy over the marriage law, *Compilations of Islamic Law in Indonesia* (*Kompilasi Hukum Islam di Indonesia*) authored by officials from the Minis-

⁴⁶ See Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 263-67; Otto, *Shari'a en Nationaal Recht*, pp. 269-92; Zaid, *Reformation of Islamic Thought*, pp. 42-43.

try of Religion and Supreme Court judges have been used since the mid-1980s to clarify points on personal law and inheritance law for application by *Shari'ah* courts. They are based on arguments from various schools, comparisons of application of Islamic law in different countries, decisions by religious courts, etc. The *Compilations* are presented as presidential instructions which have a lower status than statutes in the Indonesian legal system. A 1991 *Compilation of Islamic Law* directed the restriction of *hiba* (gifts) to a maximum of one third of the donor's estate. While this represents a reassertion of classical interpretations, the *Compilations* also draw from eclectic sources, and Supreme Court judgments on appeal from the religious appellate courts diverge from classical law in many areas.

Aceh is the only part of Indonesia that has the legal right to apply Islamic Law (*Shari'ah*) in full. Since 1999, it has begun slowly to put an institutional framework in place for the enforcement of *Shari'ah*. Islamic courts in Aceh had handled cases of marriage, divorce and inheritance for a long time.

The constitution was promulgated in August 1945. It does not adopt any official religion, but Article 29 provides that "the State is based upon the belief in the One, Supreme God," also embodied in *Pancasila*. Article 29 guarantees freedom of religion. It was abrogated by the Federal Constitution of 1949 and the Provisional Constitution of 1950, but restored after President Sukarno's decree on 5 July, 1959. During the 32 years of Suharto's administration, the constitution was never amended. Suharto refused to countenance any changes to the constitution and the People's Consultative Assembly passed a law in 1985 requiring a national referendum for any constitutional amendments.

There are four judicial branches outlined in the Basic Law on Judicial Power 1970: general, religious, military and administrative courts. General courts include District Courts of First Instance, High Courts of Appeal and the Supreme Court (*Mahkama Agung*). Religious courts (*Pengadilan Agama*) are established side by side with District Courts. Religious courts are organized at two levels: courts of first instance in each district and appellate courts in all provinces (approximately 300 and 25, respectively [figures as of mid-1990s]) and have jurisdiction over civil cases between Muslim spouses on matters concerning marriage, divorce, reconciliation and alimony. Appeals from the religious appeals court (*Mahkama Islam Tinggi*) go to the Supreme Court, although the supervisory jurisdiction of regular courts over religious courts ended with the passing of the Law on Religious Courts 1989. Religious courts have limited or special jurisdiction and secular courts have general jurisdiction. The competence of religious courts is not exclusive, and parties can apply to District Courts for adjudication on the basis of civil law derived from Dutch law or local *adat*.

Contemporary Indonesia is an especially rich source of insight into the diverse understandings and uses of the Islamic legal tradition in the modern world. Indone-

sian Muslims are engaged in vibrant and far-reaching debates on the terms, relevance and developmental limits of Islamic law, and Indonesia is home to a variety of dynamic state and non-state institutional structures for the generation and application of Islamic doctrine.

Indonesia was established in 1945 by Sukarno as a secular nation under so-called *Pancasila*, a Sanskrit word meaning five principles. These include national unity, internationalism, representative democracy, social justice and secular theism. In addition, the country has not one but three officially acknowledged justice systems. The most common is the civil continental system, a derivative of the European or continental legal system. The second is the native *adat* or tribal system, a complex system of community rights common throughout Southeast Asia. The third is *Shari'ah*, which holds that there is an absolute body of laws outside the realm of human beings, ordained by God whose final verdicts can never be contested. as an example of the latter we can mention the Compilation of Islamic Law

The Republic of Indonesia had a bitter and bloody struggle for independence, and one of its first acts was to establish a Ministry of Religion in 1946. We can mention two very important changes here.

First, the *Religious Court system* underwent significant change in 1989 with the promulgation of a new Law on Religious Justice (No. 7/1989). The larger part of this statute is concerned with establishing procedural matters; these include staffing, forms for administration, costs and so on. For the rest, jurisdiction is the main subject and this, in many ways, repeats the Dutch and later post-independence laws. Essentially, the religious courts are family law courts and their main areas are divorce and property settlement arising from divorce.

The **second** significant change occurred in 1991 with the publication of *The Compilation of Islamic Law (Kompilasi)* by presidential instruction. It is a code of law for the religious courts, even though it describes itself as a "guide." It sets out the basic sources of law and then follows these with a summary version of the classical law on marriage, inheritance and trusts.⁴⁷

6.4.2 Islamic Law in Malaysia

Malaysia is a country that consists of thirteen states and three federal territories in Southeast Asia with a total land mass of 329,847 square kilometers. The capital city is Kuala Lumpur, while Putrajaya is the seat of the federal government. The popula-

⁴⁷ R. Michael Feener and Mark E. Cammack, *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge: Harvard University Press, 2007), pp. 5ff; R. Michael Feener, *Muslim Legal Thought in Modern Indonesia*, (Cambridge: Cambridge University Press, 2007) pp. 24-104.

tion stands at over 25 million. The country is separated into two regions: Peninsular Malaysia and Malaysian Borneo by the South China Sea. Malaysia did not exist as a unified state until 1963. Previously, a set of colonies had been established by the United Kingdom in the late-18th century, and the western half of modern Malaysia was composed of several separate kingdoms. This group of colonies was known as British Malaya until its dissolution in 1946, when it was reorganized as the Malayan Union. Due to widespread opposition, it was reorganised again as the Federation of Malaya in 1948 and later gained independence on 31 August 1957. Islam is the largest as well as the official religion of the federation.

The colonial legacy in Malaysia was the Anglo-Muslim precedent and, from the 1950s, legislation (Administration of Islamic [sometimes Muslim] Law) in each of the states of the Federation. The Federal Constitution of 1957 declares Islam to be the "Religion of the Federation." The Ninth schedule, List I, gives power to the states to legislate with respect to religion.

Malaysia is a federal, constitutional, elective monarchy. Its system of government is closely modeled on that of the Westminster parliamentary system, a legacy of British colonial rule. In practice however, more power is vested in the executive branch of government than in the legislative, and the judiciary has been weakened through sustained attacks by the government during the Mahathir era.

Malaysian legal history has been determined by events spanning a period of some six hundred years. Of these, three major periods were largely responsible for shaping the current Malaysian system. The first was the founding of the Melaka Sultanate at the beginning of the 15th century. The second was the spread of Islam in the indigenous culture. Finally, and perhaps the most significant period in modern Malaysia, was British colonial rule, which brought with it constitutional government and the common law system.

The majority of Muslims are Shâfi'î, with Hanafi minorities. There are also significant Buddhist, Hindu and Christian minorities and a high proportion of followers of indigenous religions; particularly in Sabah and Sarawak (both states have Muslim minorities).⁴⁸

The legal system is based on English common law, with both Islamic law and *adat* constituting significant sources of law, particularly in matters of personal status. Malaysia has a *unified judicial system*, and all courts take cognizance of both federal and state laws. The legal system is founded on British common law. Most cases come before magistrates and sessions courts. *Religious courts* decide questions of Islamic law

⁴⁸ For more information see Abdul Monir Yaacob, *The Influence of Islamic law on Malay Law During the Pre-independent Period*, dissertation submitted for Postgraduate Diploma in Law. School of Oriental and African Studies, University of London, 1977.

and custom.

Parts of present-day Malaysia were under Portuguese and Dutch control, and starting from Penang in the late 18th century, the region eventually came under British rule, formalized by the Anglo-Dutch Treaty 1824. Malaysia and Singapore were the eventual successor states to the Straits Settlements (Penang, Singapore, Malacca), Federated Malay States (Selangor, Perak, Pahang, and Negri Sembilan) and Unfederated Malay States (Perlis, Kedah, Kelantan, Trengganu, and Johor). Sabah and Sarawak, formerly constituents of British Borneo, later joined Malaysia.

Under British rule, the first legislation regulating Islamic marriage in the Straits Settlements was the Mohammedan Marriage Ordinance 1880, mainly procedural in content. The ordinance was amended in 1908 to make registration of marriage and divorce compulsory, non-compliance being punishable by fine or imprisonment. A 1923 amendment directed the application of Islamic law to intestate succession of Muslims insofar as local custom would permit and without disinherit non-Muslim kin. The ordinance continued to be applied in Penang and Malacca until the State Acts were passed in 1959. The first codification of Malay customary law (a mixture of *adat* and Islamic law) came in 1915 with the enactment of the Laws of the Malay Courts 1915 in Sarawak.

The region was occupied by Japanese forces from 1942 to 1945, with control reverting to the British after WW II. A legislative assembly was established in 1955 and independence achieved in 1957. As of 1948, the states were granted jurisdiction over application and legislation of *Shari'ah*, and from 1952 to 1978, new laws were promulgated in the eleven Muslim majority states of Malaysia and Sabah, generally called Administration of Islamic/Muslim Law Enactments and covering the official determination of Islamic law, explanation of substantive law, and the jurisdiction of *Shari'ah* courts. New laws relating to personal law were enacted in most states between 1983 and 1987.⁴⁹

Efforts by the Kelantan State to pass a *Shari'ah* Criminal Code Enactment 1993 relating to the application of *hadd* penalties resulted in a stand-off between the federal and state governments. It was passed by the state legislature but never brought into force. It was a matter of much controversy since criminal matters fall under federal and not state legislatures' jurisdiction.

The constitution was adopted on 31 August 1957 and has been amended several times. Article 3 declares Islam to be the official state religion and also guarantees religious freedom. Articles 3 and 5 provide that the ruler of each state is the head of the

⁴⁹ See Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 268-72; Arskal Salim and Azyumardi Azra, *Shari'ah and Politics in Modern Indonesia*, (Singapore: Institute of Southeast Asian Studies, 2003), pp. 1-120; Otto, *Shari'a en Nationaal Recht*, pp. 303-26.

religion of Islam by the constitution of that state. In the absence of a Muslim ruler (in the states of Malacca, Penang, Sabah and Sarawak) or in the Federal Territories (Kuala Lumpur and Labuan) the *Yang di-Pertuan Agong* (Head of State) is declared the head of the religion of Islam.

The Ninth Schedule of the constitution outlines the legislative lists. Malaysia is a federation of thirteen states with executive and legislative powers on both state and federal level; civil law (and family law as a subset of civil law) fall under the federal legislature's jurisdiction, but persons of the Malay race are defined as Muslims under the constitution, and the states are empowered to make personal laws governing Muslims and laws relating to religious offences and to establish and regulate *Shari'ah* courts for the application of Islamic law. Personal status law relating to non-Muslims falls under the federal legislature's jurisdiction (governed by the Malaysian Law Reform [Marriage and Divorce] Act 1976 that repealed all previous statutes on marriage and divorce governing non-Muslims). Clarification of points of Islamic law belongs to the jurisdiction of each state's *Majlis* (Council of Religion and Malay Custom). The *Majlis* generally issue *fatâwâ* that are in keeping with Shâfi'î tenets except where such may conflict with public interest. In such instances the councils may (with the approval of the state authorities) follow minority Shâfi'î views or interpretations from the other three major Sunnî *madhâhib*.

There are three levels of *Shari'ah* courts in a system parallel to and independent of the civil courts: *Shari'ah* Subordinate Courts, *Shari'ah* High Court and *Shari'ah* Appeal Court.

1. *Shari'ah* Subordinate Courts have jurisdiction as indicated by state legislation over criminal suits liable to punishment up to 2,000 *ringgit* and/or imprisonment up to two years and civil suits in which the value of the subject in dispute is up to 100,000 *ringgit* or not estimable in cash.

2. The *Shari'ah* High Court has appellate jurisdiction over Subordinate Court decisions in civil suits of 500 *ringgit* or more and criminal suits. The *Shari'ah* High Court has original jurisdiction as indicated by state legislation in criminal suits and civil jurisdiction over betrothal and marriage, divorce, nullification or separation, marital property claims, maintenance of dependants, legitimacy, guardianship and custody, testate and intestate succession, gifts *inter vivos* and *awqaf*, in cases where all parties are Muslims.

3. The *Shari'ah* Appeal Court has appellate jurisdiction over decisions arising out of the *Shari'ah* High Courts original jurisdiction; all appeals are heard by the Chief *Shari'ah* Judge and two other members and decisions are by majority opinion.

In September 2000, the government announced that it would establish a separate family court.

All the legislation in Malaysia deals with three areas of law.

1. The **first** is what one might describe as the “official determination” of principle. Here the legislation establishes a *Majlis* (Council) that oversees finances, courts and, most importantly, establishes *fatwâ* committees. These committees issue opinions on points of principle relating to law and dogma. Its opinion is binding in the state for which it is issued. The status of *fatâwâ* has always been contentious in Anglo-Muslim precedent. While the terms on which *fatâwâ* may be issued are set down in the State Enactments, that is, the sources for them are in the classical jurisprudence of the four Sunnî schools, which are not “known” in the English law sense (that is, in the rules of evidence). Admissibility, therefore, depends on the existing rules of evidence, the precedent on which had already decided that “Muslim” law was a “local law” that could not simply be “found” but had to be proved. In addition, the constitutions of 1957 (Federation of Malaya) and 1963 (Malaysia) distinguished between the secular and religious courts, and it was the former that had ultimate authority.

2. The **second** part of the States’ Enactments establishes the religious courts and sets out jurisdiction, which is essentially in family law and trusts. Again, this raised difficulties with the secular courts that, in a series of decisions from the 1960s to the 1980s, reiterated their overriding jurisdiction, relying on federal statutes made under federal constitutional authority. To be sure, very few cases came to the High Courts or the Federal Court in Muslim family law matters. The vast majority of applicants to the religious courts were poor and mostly women. But there were enough appeals at the higher level to demonstrate the inequality of the two respective jurisdictions.

3. The **final** part of the State Enactments sets out the substantive principles of *Shari’ah*. These are family law, parts of the law of property and offences against religion. The actual rules are accurate short summaries from *fiqh* textbooks. The notable feature is that while the rules certainly state principles, they are drafted in a form that recognizes bureaucratic administration. In this they are like any other statute. The result is that the success or otherwise of any action depends as much on forms and formality as it does on its correctness in *fiqh* principle.

The legislation has been much elaborated since the 1980s in all the states. There are now several enactments in each state, which go into each of these three aspects of syariah administration in increasing detail.

In particular, the subject of offences has been widened to include such areas as apostasy. In fact, in the past 20 years *Shari’ah* has become increasingly defined in criminal law terms. In 1993 the state of Kelantan even proposed the introduction of the seventh-century Arab penalties of mutilation and amputation for a variety of offences. Unhappily, this is largely politically driven. Nothing has come of it in practice, however, due to the Federal Constitution and the separation of jurisdiction, which

have rendered such initiatives unenforceable.

The Federal Constitution is central and nowhere more so than in the vexed issue of secular court - religious court jurisdiction. There was a new article included, 121(IA), that states: "[The secular courts] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts."

There is a precedent for what this article means from both the High Courts and the Federal Courts. The conclusion is that the religious courts have exclusive jurisdiction in respect of the matters specified in the Ninth Schedule to the constitution. While this solves the jurisdiction issue and could dispose of the Anglo-Muslim precedent, the fact remains that the definition of "religious"/"religion" is still a matter for the secular courts.

But what actually is the *Shari'ah* in the religious courts – is it *fiqh* or something else or both? Recent data show that while the courts certainly rely on the classic texts of *fiqh*, the way in which they deal with them, especially at the Appeal Board level, is through methods of legal analysis derived from English law. Thus, we have "precedent," "persuasive," and the practice of "distinguishing" and so on. The earlier Anglo-Muslim precedent is not cited. Instead we now have a new, indigenous form being created. It even has its own law reports of records, the *Jurnal Hukum*.⁵⁰

6.5 Islamic Law in Saudi Arabia

The Kingdom of Saudi Arabia or KSA is an Arab country and the largest country in the Arabian Peninsula. The Hanbalî school is the official *madhhab* in Saudi Arabia. There is also a Shi'î minority that adheres to the Ja'farî school.

Saudi Arabia was never directly colonized, although parts of the present-day state came under nominal or intermittent Ottoman control since the 16th century. Turkish garrisons were at times stationed in Mecca, Medina, Jeddah and other centers, but the Ottomans exercised only limited powers, and local rulers had a high degree of autonomy in internal affairs. The Ottomans' final efforts at ruling eastern Arabia in 1871 to forestall the growing British influence at their borders in the Arabian Gulf eventually failed. The basis of the Wahhâbi state of Saudi Arabia was established in 1902 when Abd al-Azîz al-Sa'ud and his followers gained control of Riyadh, signaling the beginning of the third period of Saudi Wahhâbi dominance in the region. Abd al-Azîz consolidated his territorial gains over the next decade, expanding out of the surroundings of Riyadh and the eastern part of the region into the areas where the Ottomans had been expelled. The Kingdom of Saudi Arabia was declared on 22 Septem-

⁵⁰ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 268-72; Hooker, *Introduction*, pp. 221-23.

ber 1933 over those countries that had come under Abd al-Azîz's control by conquest and by forging numerous alliances.

Following the 1979 seizure of the Grand Mosque in Mecca, the decline in oil prices in the 1980s, and the effects of the Second Gulf War, tentative efforts have been made to establish a more representative form of governance. A *Majlis al-Shûrâ* (Consultative Council) was introduced by King Fahd in 1993. The *Majlis* had 61 appointed members; in 1996 this was increased to 90. Although the *Majlis* has no legislative powers, it may examine government policies and propose laws or amendments to existing laws. Decisions or suggestions from the *Majlis* are first sent to the Council of Ministers for review and then to the king for his approval.

The main sources of Saudi law are *Hanbalî fiqh* as set out in a number of specified classical scholarly treatises by authoritative jurists, other Hanbalî sources, other schools of law, state regulations and royal decrees (where these are relevant), and custom and practice. Royal decrees have been used to direct courts to base judgments on several authoritative classical treatises by Hanbalî jurists (e.g., *al-Mughnî* by ibn Qudamah). A resolution of the Supreme Judicial Council passed in 1928 also directed the courts to rely on particular Hanbalî sources in civil matters, ranked as follows: *Sharh Muntahâ al-Îrâdât* and *Kashshâf al-Qinâ' an Matn al-Iknâ'* (both by al-Bahutî), commentaries by al-Zad, commentaries by al-Dalîl and, if no suitable provision is found, then secondary sources in Hanbalî legal manuals, and lastly, reference to authorities of other *madhahib*. If no answer is found in officially sanctioned sources, then one may resort to *Ijtihâd*. Traditional areas of law continue to be governed by *Sharî'ah* law while certain spheres of law relating to corporate, tax, oil and gas, immigration law, etc. have been regulated by royal decrees and codes.⁵¹

Saudi Arabia has no formal constitution, the functions of which are served by the Basic Law articulating the government's rights and responsibilities issued by King Fahd in March 1992. Article 1 of the Basic Law declares Islam to be the official state religion and the Qur'an and the *Sunnah* its constitution. The Basic Law also provides that "the state protects the rights of the people in line with the Islamic *Sharî'ah*," affirms the independence of the judiciary and states that the administration of justice is based on "*Sharî'ah* rules according to the teachings of the holy Qur'an, the *sunnah*, and the regulations set by the ruler provided that they do not contradict the holy Qur'an and *Sunnah*." Article 9 of the Basic Law states that "the family is the kernel of Saudi society, and its members shall be brought up on the basis of the Islamic faith." Article 26 provides that the state protects human rights "in accordance with the Islamic *Sharî'ah*."

⁵¹ See Otto, *Sharî'a en Nationaal Recht*, pp. 85-105; Cf. Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 136-38; Vikør, *Between God and the Sultan*, pp. 264-68.

Sharī'ah courts have general and residual jurisdiction, i.e. jurisdiction over any case or matter over which the jurisdiction has not been expressly assigned to another tribunal. There are four levels of *Sharī'ah courts*: Minor Courts, General Courts, Cassation Court and the Supreme Judicial Council. Civil claims may also go to the Amarah, in which case the Amir attempts to guide the disputing parties to a compromise. The case is ultimately referred to the courts if a settlement is not reached. There are also a number of specialized tribunals for settling disputes in specific areas, such as commercial or labor law; these specialized tribunals are formed under various ministries outside of the Ministry of Justice. The highest appellate tribunal in all matters, the Board of Grievances, is also independent of the Ministry of Justice and, since its reorganization in 1982, has been made directly responsible to the king.

Criminal cases are tried in *Sharī'ah courts* in the country. These courts exercise authority over the entire population including foreigners (regardless of religion). Cases involving small penalties are tried in *Sharī'ah summary courts*. More serious crimes are adjudicated in *Sharī'ah courts* of common pleas. Courts of appeal handle appeals from *Sharī'ah courts*.

Civil cases may also be heard in *Sharī'ah courts* with one exception: Shi'ī may try such cases in their own courts. Other civil proceedings, including those involving claims against the government and the enforcement of foreign judgments, are heard by specialized administrative tribunals, such as the Commission for the Settlement of Labor Disputes and the Board of Grievances.

The Saudi legal system prescribes capital punishment or corporal punishment, including amputations of hands and feet, for certain crimes such as murder, robbery, rape, drug smuggling, homosexual activity and adultery. The courts may impose less severe punishments, such as floggings, for less serious crimes against public morality such as drunkenness.

Murder, accidental death and bodily harm are open to punishment by the victim's family. Retribution may be sought in kind or through blood money. The blood money payable for a woman's accidental death is half as much as that for a man. The main reason for this is that, according to Islamic law, men are expected to be providers for their families and are therefore expected to earn more money. The blood money for a man would be expected to be able to sustain his family, at least a for short time. This generally stems from the fact that honor killings occur within a family and are done to compensate for some dishonorable act that was committed. Slavery was abolished in 1962.⁵²

⁵² Taha Mahmood, "Gulf," in *Statutes of Personal Law in Islamic Countries*; Aba-Namay, p. 85: "The New Saudi Representative Assembly," in *Islamic Law and Society* 5/1 (1998): 235-65; S.H. Amin,

6.6 Islamic Law in Iran

Islamic Republic of Iran is a Islamic republic in the Middle East in western Asia; Iran was the core of the ancient empire that was known as Persia until 1935. Iran was ruled by a series of dynasties for 2,500 years and Shi'ism became the official religion under Safavid rule (1501-1722). The increasing influence of foreign powers in the region under the Qajars (1795-1925) began with a series of capitulations to Europeans, beginning with the Russians, in the 19th century. In 1906 the first constitution was promulgated and a series of laws were enacted thereafter dealing with criminal, civil, commercial and family law. By 1936 legislation made secular education a requisite for serving judges. Major changes were introduced into the area of family law under Reza Shah with the passage of Family Protection Law 1967 (significantly amended in 1975) abolishing extrajudicial divorce, requiring judicial permission for polygamy – and then only under specific circumstances – and establishing special family courts for the application of the new personal status legislation. The 1979 Revolution brought an end to the Pahlavi dynasty (1925-1979). The Supreme Judicial Council issued a proclamation directing courts that all non-Islamic legislation was suspended and it was given a remit to revise all existing laws in order to Islamize the legal system, with Ayatollah Khomeini's *Fatâwâ* serving as "transitional laws."⁵³

The sources of law are Islamic Law, constitutional law, legislation, informed sources such as custom, revolutionary principles, etc.

The Ja'farî school is the predominant *madhhab* in Iran. There are also Hanafi Muslim minorities, as well as Zoroastrian, Baha'i, Christian and Jewish minorities. The officially recognized religions are Sunni Islam, Zoroastrianism, Judaism and various Christian denominations. Under a 1933 law relating to the rights of non-Shi'ite Iranians, courts are to apply the personal status laws applicable to the litigants belonging to the officially recognized religions.

The current constitution was adopted on 2-3 December 1979, with significant revisions expanding presidential powers and eliminating the prime ministerial position in 1989. Article 4 provides that all civil, penal, financial, economic, administrative, cultural, military, political and any other laws must be based on Islamic criteria. Article 12 provides that the official state religion is Islam and the Twelver Ja'farî school; other

Middle East Legal Systems (Glasgow: Royston Limited, 1985); Alexei Vassiliev, *The History of Saudi Arabia* (London: Saqi Press, 1998).

⁵³ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 108-111; Cf. Ashk Dahlén, *Islamic Law, Epistemology and Modernity: Legal Philosophy in Contemporary Iran*, (New York: Routledge, 2003) pp. 39-54.

schools of law are to be accorded full respect and freedom of religious practice, including matters of personal status.

The special courts established by the Family Protection Act 1967 were disbanded after the Revolution. The 1979 Constitution provides that the chief of the Supreme Court and the Prosecutor General must be *mujtahids*. The Special Civil Courts were established in 1979 to adjudicate on matters relating to family law, succession and *awqâf*. The court structure since the Revolution is as follows (numbers as of 1984): Revolutionary Courts (70 branches); Public Courts: Civil Courts (205), Special Civil Courts (99), 1st Class Criminal Courts (86), 2nd Class Criminal Courts (156); Courts of Peace: Ordinary Courts of Peace (124), Independent Courts of Peace (125), Supreme Court of Cassation (22).

Iran signed the ICCPR and ICESCR in 1968 and ratified both covenants in 1975 without reservation. Iran signed the CRC in 1991 and ratified it in 1994 with a general declaration and reservation to the effect that the Islamic Republic reserves its rights regarding the articles and provisions that might be contradictory to *Sharī'ah*, thus reserving the right not to apply any provisions incompatible with Islamic Laws and the international legislation in effect.⁵⁴

6.7 Islamic Law in Egypt

Arab Republic of Egypt is a republic in northeastern Africa known as the United Arab Republic until 1971; site of an ancient civilization that flourished from 2600 to 30 BC. The legal system is based on Islamic law and French codes. A reformist movement developed in the late nineteenth century, led by such prominent thinkers and commentators as the Grand Muftî Muhammad 'Abduh and Raḥsîd Ridhâ. Egypt was among the first countries after France to establish a judicial institution. This began in 1875 with the enactment of the modern codification under which mixed tribunals were established. Ottoman rule reinforced the public and political roles of the *'ulamâ* (religious scholars) because Islam was the state religion and because political divisions in the country were based on religious divisions. During the nineteenth and twentieth centuries, successive governments made extensive efforts to limit the role of the *'ulamâ* in public life and to bring religious institutions under closer state control. The secular transformation of public life in Egypt depended on the development of a civil

54 'Abdullâhi Abdullahi Ahmad An-Na'im, *Islamic Family Law in a Changing World*, pp. 108-11; *Lawyers Committee for Human Rights*, Report by The Justice System of the Islamic Republic of Iran (Washington DC: May 1993); Taha Mahmood, "Iran," in: *Statutes of Personal Law in Islamic Countries*, pp. 65-69, 193-94; Vikør, *Between God and the Sultan*, pp. 269-71.

bureaucracy that would absorb many of the *ulamâ*'s responsibilities in the country.⁵⁵

The Egyptian judicial institution that existed in the mid-19th century was characterized by the following.

Courts at that time were not entirely national: there were courts for foreigners known as "consular courts."

The judicial authority at that time was not the only authority entrusted with giving rulings on disputes, but there was another system that enabled members of the executive authority to issue rulings in certain cases.

The unified judicial system that had existed since the Ottoman rule of Egypt was abandoned. During the Ottoman era judiciary power was assumed by one person known as the Chief Justice, assisted by four deputies representing the four schools of Islamic jurisprudence: Hanafî, Shâfi'î, Mâlikî and Hanbalî. During Mohamed Ali's reign over Egypt and his attempt to build a modern Egyptian state, two significant developments took place in Egypt, leading to the existence of various bodies of civil judiciary in the country.

In summary, Egyptian law was based on Islamic Law and civil law (particularly French codes). Egypt attained independence from the Ottoman Empire in matters of legal and judicial administration in 1874. Judicial reform began in 1875, leading to the establishment of *mukhtalatat* (mixed) and *ahli* (national) courts. As Egypt increasingly came under foreign influence, the legal system began increasingly to resemble European systems.⁵⁶

Let us look at this in detail.

1. **The Egyptian Judicial System** (or judicial branch) is an independent branch of the government that includes both secular and religious courts. The Egyptian judicial system is based on European – primarily French – legal concepts and methods. Under the several governments during the presidency of Hosni Mubarak, the courts have demonstrated increasing independence, and the principles of due process and judicial review have gained greater respect. *Shari'ah* courts were integrated into the national court system in 1956. Family law is applied within the national courts by judges trained in *Shari'ah* (separate family courts for Copts). Appeals go through the regular courts to the Court of Appeals and then to the Court of Cassation.

The legal code is derived largely from the Napoleonic Code. Marriage and personal status are based primarily on the religious law of the individual concerned. Thus,

⁵⁵ Daisy Hilse Dwyer (ed.), *Law and Islam in the Middle East*, (New York: Bergin & Garway, 1990), pp. 1-40.

⁵⁶ See J.M. Otto, *Shari'a en Nationaal Recht*, pp. 19-38; 'Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World*, p. 169.

there are three forms of family law in Egypt: Islamic, Christian and secular (based on the French family laws).

2. **The Egyptian Civil Code** is the primary source of civil law for the Egypt. The first version of this code was written in 1949, and its primary author was Abdel-Razzak al-Sanhuri, who was assisted by Dean Edouard Lambert of the University of Lille. Perhaps due to Lambert's influence, the 1949 code followed the French civil law model, focusing on the regulation of business and commerce and excluding any provisions regarding family law. The code also provides for Islamic law to have a role in its enforcement and interpretation. Article 1 of the code provides that "in the absence of any applicable legislation, the judge shall decide according to custom and failing custom, according to the principles of Islamic Law. In the absence of these principles, the judge shall have recourse to natural law and the rules of equity." Despite this invocation of Islamic law, one commentator argued that 1949 code reflected a "hodgepodge of socialist doctrine and sociological jurisprudence."

The Egyptian Civil Code has been the source of law and inspiration for numerous other Middle Eastern jurisdictions, including the pre-dictatorship kingdoms of Libya, Jordan and Iraq (both drafted by El-Sanhuri himself and a team of native jurists under his guidance), Bahrain, as well as Qatar (the last two merely inspired by his notions) and the commercial code of Kuwait (drafted by al-Sanhuri).

3. **Criminal Code.** Egypt based its criminal codes and court operations primarily on British, Italian, and Napoleonic models. Criminal court procedures had been substantially modified by the heritage of Islamic legal and social patterns and the legacy of numerous kinds of courts that formerly existed. The divergent sources and philosophical origins of these laws and the inapplicability of many borrowed Western legal concepts occasioned difficulties in administering Egyptian law.

4. **Family and Personal Status Law.** According to a 1995 law, the application of family law, including marriage, divorce, alimony, child custody, inheritance, and burial, is based on an individual's religion. In the practice of family law, the state recognizes only the three "heavenly religions": Islam, Christianity and Judaism. Muslim families are subject to the Personal Status Law, which draws on *Shari'ah* (Islamic Law). Christian families are subject to canon law, and Jewish families are subject to Jewish law. In cases of family law, disputes involving a marriage between a Christian woman and a Muslim man, the courts apply the Personal Status Law.

In most Arab countries the personal status laws are based on the provisions of *Shari'ah*. Yet, they differ according to the established Islamic doctrines. The Islamic *Shari'ah* retains a great deal of diversity and flexibility and compatibility with the conditions of society in every age according to certain *Fiqh* rules highlighted in the Qur'an and the *Sunnah*. These laws were set down in Egypt in the first quarter of the 20th

century. Legislators at that time followed the most conservative *fiqh* traditions.

Organizing the personal status of Muslims in Egypt started in the early 20th century through a regulation for the organization of the *Shari'ah* courts and other measures concerned. Two royal decrees were issued, dated 10 December, 1920, regarding family financing and some personal status matters and law no. 25 for the year 1929. Personal status laws have not changed since that times, although a number of amendments were introduced, the last by-law no. 100 for the year 1985.⁵⁷

6.8 Islamic Law in Libya

Socialist People's Libyan Arab Jamahiriya is a military state in northern Africa on the Mediterranean; consists almost entirely of desert; a major exporter of petroleum. The legal system includes elements of French, Islamic and Italian law. Libya became a part of the Ottoman Empire in 1551. Following the Italia-Turkish War (1911-1912), Italy annexed Libya in 1934 after exiling the most resistant elements of Libyan society, led by the Sanusiyya. Libya remained an Italian colony until World War II when the Allied forces and Libyan returnee fighters ousted German and Italian forces, following which the British and French shared control over the region. Libya gained independence in 1951, under its first king, Syed Idris al-Sanusi. A military coup in 1969 brought an end to the monarchy, and a republic was established under Colonel Muammar al-Qaddafi. The Revolutionary Command Council established a Committee for the Codification of Personal Law in the early years following the revolution.

The Maliki school is the predominant *madhhab* in Libya. Libya also has a small Christian minority.

While the Committee was still in deliberation, the RCC issued a decree identifying *Shari'ah* as the principal source of all legislation and establishing a High Commission to examine all existing legislation in order to make it consistent with *shari'i* principles. Legal provisions for the purpose of bringing legislation into accord with *Shari'ah* were to be based on *takhayyur*, *maslahah*, and custom and usage where the Malikî is the predominant school. Some of the recommendations of the Personal Law Codification Committee lead to the passage of the Law on Women's Rights in Marriage and Divorce in 1972, introducing innovative provisions on *khul'*. The Penal Code 1953 was also amended by several laws passed in the early 1970s, making Libya the first country

⁵⁷ Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World*, pp. 169-74; Yvonne Yazbeck Haddad and Barbara Freyer Stowasser, *Islamic Law and the Challenges of Modernity*, (Creek, CA: Alta Mira Press, 2004), pp. 21-99; Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997); Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'ah into Egyptian Constitutional Law* (Leiden: Brill Academic Publishers, 2006); Zaid, *Reformation of Islamic Thought*, pp. 38-40.

to introduce *hadd* punishments by state legislation. Penalties for various crimes such as theft, *zinâ*, *qadhf* and artificial insemination, were introduced by the amendments, although commentators note that the punishments have rarely been applied in practice.

A new Family Law was enacted in 1984 which raised the marriage age, restricted polygamy and divorce, and to a lesser extent gave the spouses' equal mutual rights and obligations. Article 72 of the Family Law directs recourse to the sources of the *Sharî'ah* as a residual source of law in the absence of specific provisions in the legislation. Constitutional Status of Islamic Law: A Constitutional Proclamation was issued on 11th December 1969 and amended on 2 March 1977. Article 2 declares Islam the official state religion. The state also protects religious freedoms "in accordance with established customs". Article 37 of the Proclamation states that a permanent constitution is to be drafted, but it has yet to be produced. Article 2 of The Declaration on the Establishment of the Authority of the People issued in March 1977 provides that "[t]he Holy Qur'an is the Constitution of the Socialist People's Libyan Arab Jamahiriya". Colonel Qaddafi also elucidates his own political and social theories in the Green Book, based on a speech delivered in April 1975.

After the Revolution, Qaddafi abolished the dual system, and civil and *Sharî'ah* courts were merged in 1973. There are four levels of courts: summary courts, courts of first instance, appeal courts, and the Supreme Court. Courts of first instance have numerous divisions, including a personal status division. The courts of appeal (numbering three in 1987, at Tripoli, Benghazi and Sabha) and the courts of first instance are both constituted by three-judge panels with judgments confirmed by majority decisions. The *Sharî'ah* judges who once would have constituted the personnel of the *Sharî'ah* Court of Appeals now sit in the regular courts of appeal, specializing in *Sharî'ah* appellate cases. The Supreme Court has five chambers: civil and commercial, criminal, administrative, constitutional, and *Sharî'ah*.⁵⁸

6.9 Islamic Law in Morocco

Morocco "*al-Maghreb*," officially the Kingdom of Morocco, is a country located in North Africa with a population of 33,757,175. It has a coast that stretches from the Atlantic Ocean past the Strait of Gibraltar into the Mediterranean Sea.⁵⁹

Morocco has a dual legal system consisting of secular courts based on the French legal tradition and courts based on the Jewish and Islamic traditions.

⁵⁸ Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World*, pp. 174-77.

⁵⁹ For a detailed information about Morocco, see: Jamil M. Abun-Nasr, *A History of the Maghrib in the Islamic Period*, (Cambridge: Cambridge University Press, 1987).

The secular system includes communal and district courts, courts of first instance, appellate courts and a Supreme Court. The Supreme Court is divided into five chambers: criminal, correctional (civil) appeals, social, administrative and constitutional. The Special Court of Justice may try officials on charges raised by a two-thirds majority of the full *Majlis*. There is also a military court for cases involving military personnel and occasionally matters pertaining to state security. The Supreme Council of the Judiciary regulates the judiciary and is presided over by the king. Judges are appointed on the advice of the council and judges in the secular system are university-trained lawyers. As of 1965 only Moroccans may be appointed as judges and Arabic is the official language of the courts.

Under French and Spanish rule, the colonial legal systems influenced local developments outside of the sphere of family law. *Shari'ah* courts continued to apply Mâlikî *fiqh* during the first half of the century (in addition to local tribunals applying customary law). Following independence in 1956, a Law Reform Commission was established to draft a code of personal status. A code was passed into law within the next year, based on dominant Mâlikî doctrines as well as on *takhayyur*, *maslahah* and legislation from other Muslim countries (perhaps, most importantly, the Tunisian Code of Personal Status 1956). Article 82 of the Code states that "[w]ith regard to anything not covered by this law, reference shall be made to the most appropriate or accepted opinion or prevailing practice of the school of Imâm Malik." Major amendments to the Code's provisions relating to marriage guardianship, polygamy, *talaq* and *mut'ah al-talaq* were made in 1993⁶⁰

We can summarize the situation as follows:

The colonial legal system influenced the development of Morocco's legal system while *Shari'ah* courts continued to apply Mâlikî *fiqh* to matters of family law, with local tribunals also applying customary law. Following independence in 1956, a Code of Personal Status (*al-Mudawwana*) was issued based on the dominant Mâlikî doctrine, adopting some provisions from other schools and legislation in neighboring countries. Major amendments were made to the MCPS in 1993.

The constitution was adopted on 10 March 1972 with major revisions in 1992 and 1996. Article 6 declares Islam to be the official state religion and guarantees freedom of worship for all citizens.

There are four levels of courts: 27 *sadad* courts, 30 regional courts, 9 courts of appeal and Supreme Court in Rabat [figures as of late 1980s]. The *sadad* and regional courts are divided into four sections: *Shari'ah*; rabbinical; civil, commercial and admin-

⁶⁰ See Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 178-81; Otto, *Shari'a en Nationaal Recht*, pp. 43-78.

istrative; and penal. *Sadad* courts are the courts of first instance for Muslim and Jewish personal law. The *Sharī'ah* sections of the regional courts also hear personal status cases on appeal.

The Code of Personal Status 1957-1958 (major amendments made by Law no. 1.93.347 1993) is based on the Mālikī school.⁶¹

6.10 Islamic Law in Nigeria

Federal Republic of Nigeria is a republic in West Africa on the Gulf of Guinea; gained independence from Britain in 1960; most populous African country. Nigeria gained independence from Britain in 1960. A military coup in 1966 marked beginning of long period of military rule punctuated by brief periods of civilian rule (1979-1983, 1999).

The colonial system was by and large continued after independence in 1960, only the names were changed. Native courts became local courts, but were still split into one system for non-Muslims in the south and another for Muslims in the north. The national or state law, with addition of such statutes as were passed by legislative assemblies at federal or state level. Family law under the *fiqh* had imposed. The legal system is based on English common law, Islamic law, and customary law. Due to the system of indirect rule, traditional authorities retained powers over their communities. The British introduced statutory monogamous marriage with 1914 Marriage Act. About half the population is Muslim, about 40 percent Christian, and about 10 percent practice traditional indigenous religions or no religion.

The Muslim Fulani Usman dan Fodio led a *jihād* (Fulani *Jihād* or Sokoto *Jihād*) against the Hausa aristocracy in the Kingdom of Gobir in northern Nigeria in the early 19th century, establishing a new empire with its capital at Sokoto under which an elaborate *Sharī'ah* court structure developed. The British adapted Emirs' Judicial Councils from the existing judicial structures in northern Nigeria; these continued to serve as appellate courts in the emirates until the establishment of the Sharī'ah Court of Appeal in 1959. Judicial reforms initiated in the late 1960s created grades of *alkalis'* (*qādhīs'*) courts; initially there were four grades and since reforms in the late 1970s, three grades. The first instance courts established were Area Courts Grades 2 and 1, then the Upper Area Court and the Upper Area Court of Appeal, with the highest state level appellate jurisdiction lying with the *Sharī'ah* Court of Appeal in each state.

The current Constitution was adopted in 1999. Six new states were established in 1996, bringing the total number of states to 36, in addition to the Federal Territory of

⁶¹ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 178-81; Taha Mahmood, "Morocco" in *Statutes of Personal Law in Islamic Countries*, pp. 33-5, 155-62.

Abuja. Part 2.10 of the Constitution states that "The Government of the Federation or of a State shall not adopt any religion as the State Religion."

The Supreme Court is the highest federal court, with appellate jurisdiction over the lower federal courts and the highest state courts. Each state has its own judicial system, including Magistrates' or District Courts (first instance in civil and criminal matters) and a High Court (original and appellate jurisdiction). The Constitution also provides that states may establish lower and appellate customary courts having limited civil jurisdiction. The northern states have separate *Shari'ah* courts to administer Islamic personal law.

The Constitution provides for the establishment of higher *Shari'ah* courts. Article 236(1) establishing a Court of Appeal provides that no less than three of at least 15 judges will be well-versed in Islamic law and no less than three in customary law. The Court of Appeal hears appeals from the Federal High Court, State High Courts, *Shari'ah* Courts of Appeal, and Customary Courts of Appeal. Article 259(1) provides for *Shari'ah* Courts of Appeal for any States requiring them. *Shari'ah* Courts of Appeal consist of a Grand *Qâdhî* and as many *qâdhîs* as the State Assembly prescribes, with at least two *Qâdhîs* hearing appeals. The 1999 Constitution also provides that the federal government is to establish a Federal *Shari'ah* Court of Appeal and Final Court of Appeal; however, the government had not yet established such courts.⁶²

6.11 Islamic Law in Lebanon

Lebanon, officially the Republic of Lebanon or the Lebanese Republic, is an Arab country in Western Asia on the eastern shore of the Mediterranean Sea. Since 1943 Lebanon has had a unique political system known as confessionalism, based on a community-based power-sharing mechanism. It was created when the ruling French Mandate expanded the borders of the former autonomous Ottoman Mount Lebanon district that was populated mostly by Maronite Christians and Druze. The majority of Muslims are Hanafî or Ja'farî, with Druze, Isma'îlî and Alawi/Nusairi minorities. There are also several Christian denominations (including the Orthodox and Catholic Churches and one Protestant church) and a small Jewish minority.

Lebanon is a parliamentary democratic republic that implements a special system known as confessionalism. This system is intended to ensure that sectarian conflict is kept at bay and attempts to represent the demographic distribution of the eighteen recognized religious groups in the governing body fairly. As such, high-ranking offices are reserved for members of specific religious groups. The president, for example, has

⁶² Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 298-99; Vikør, *Between God and the Sultan*, pp. 247-50.

to be a Maronite Catholic Christian, the prime minister a Sunnî Muslim and the speaker of parliament a Shî'a Muslim. The constitution was adopted on 23 May 1926 and amended numerous times. There is no official state religion or recognition of *Shari'ah* as a source of legislation.

Lebanon's *judicial system* is a mixture of Ottoman law, Napoleonic code, canon law and civil law. The Lebanese court system consists of three levels: courts of first instance, courts of appeal and the court of cassation. The Constitutional Council rules on the constitutionality of laws and electoral frauds. There also is a system of religious courts having jurisdiction over personal status matters within their own communities, with rules on matters such as marriage and inheritance. Lebanon was under Ottoman rule for three centuries from 1516 on with relative autonomy. Under French mandate from 1918 to 1943 French civil law greatly influenced the development of the Lebanese legal system and judiciary, but the French authorities did not affect substantive changes to the *Ottoman Law of Family Rights 1917* or to uncoded aspects of personal law.

The Republic of Lebanon was a part of the Ottoman Empire for about three hundred years. At the end of World War I it became a separate political entity under French mandate. It consisted of the historical Mount Lebanon and parts of other territories that the Ottoman Empire relinquished as a result of the war. In 1943 Lebanon gained full independence and sovereignty and later participated in the 1945 San Francisco Conference as a founding member of the United Nations.

During the Ottoman period Lebanon was governed directly by the Sublime Porte in Istanbul with special political status given to the historical Mount Lebanon, which constitutes the foundation of the present Republic of Lebanon. Afterwards, it became a parliamentary democratic republic governed in accordance with a written constitution issued in 1926. Upon gaining full independence in 1943, an unwritten national understanding arose according to which the office of president of the republic was reserved for a Maronite Christian, the office of prime minister for a Sunnî Muslim, and the office of speaker of the house for a Shi'ite Muslim. This unwritten national pact has its roots in article 95 of the 1926 Constitution that provided for equitable representation in public service positions among the various religious denominations.

During Ottoman rule the legal system applied in Lebanon was basically Islamic Law as formulated by the Hanafî school. In conformity with Islamic law, each religious community had the right to apply its own law on a wide range of legal issues and to maintain its own judicial system to resolve conflicts related to such issues.

Since the time of the French Mandate, Lebanon gradually started to adopt new laws and legislation modeled after the French law, which is a civil law system. However, the 18 religious communities officially recognized in Lebanon continued to enjoy

independence in applying their own laws and maintain their own judicial systems to deal with matters related to personal status, marriage, divorce and other family relations

The Lebanese Judiciary. The judiciary in Lebanon is divided horizontally into four main court systems, each having a multilevel hierarchical structure. These systems are: The first is the *judicial court system* known as *kadhâ'*. The judicial court system is composed of three court levels of general jurisdiction. Original jurisdiction is normally found in the courts of first instance, followed by the courts of appeal, and finally the Cassation Court. The second is the *administrative court system* known as *Majlis al-Shûrâ*. This system is composed of administrative tribunals and the State Consultative Council (*Majlis Shûrâ al-Dawla*). Third is the *military court system*. Fourth are the *religious court systems*. This system is composed of the court systems of the eighteen recognized denominations pertaining to the three main religions of Christianity, Islam and Judaism. The jurisdiction of these courts is limited to personal status and family law matters as authorized by law. Communal jurisdiction is awarded to Muslims, Druze, Christians and Jews. There are two levels of *Shari'ah* Courts (with Sunnî and Ja'farî judges): *Shari'ah courts* of First Instance and the Supreme *Shari'ah* Court in Beirut with 3 *Qâdhîs* and a civil judge acting as Attorney-General. There are also two levels of Druze courts: Courts of First Instance and the Supreme Court of Appeal. Law on Organization of *Shari'ah courts* 1962 recognizes Qadri Pasha's unofficial code of personal law as a residual source of law.

Some relevant legislation is the following:

- Ottoman Civil Code (*Majalla*) 1878
- (Ottoman) Law of Family Rights 1917; The Law of the Rights of the Family 1962 directs the application of Hanafî doctrine to Sunnî personal status cases (except for those matters covered by the specific provisions of the OLFR), and Ja'farî *fiqh* and provisions of the OLFR applicable to Ja'farîs in Ja'farî personal status cases. There is separate legislation applicable to Druze personal status
- Decree no. 3503 1926 (relevant to application of Ja'farî law)
- Codified (Druze) Personal Status Law 1948
- Law on the Rights of the Family 1962
- Law on Organization of the *Shari'ah* Courts 1962.⁶³

⁶³ Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World*, pp. 126-28.

6.12 Islamic Law in Syria

Syria was the center of the Umayyad caliphate until the Abbasid Revolution of 756. It was governed by a succession of Arab, Crusaders, Ayyubid rulers, and Mamluke rulers, then by the Ottomans from 1516 on. After the Ottomans, after WW I, the League of Nations declared a French Mandate over the region in 1922, from which Syria gained independence in 1946.

Syria has a Hanafî majority with Ja'farî, Druze, Isma'îli and Alawi minorities; as well as several Christian denominations and very small Jewish communities in Damascus, al-Qamishli, and Aleppo.

The constitution was adopted on 13 March 1973. Article 3(1) declares that the religion of the president of the republic will be Islam, and Article 3 declares Islamic jurisprudence to be the main source of legislation.

Separate legal systems exist for civil and criminal matters and for personal status matters. The lowest courts for civil and criminal matters are peace courts, followed by courts of the first instance (1 in each of the 14 districts) with jurisdiction over civil and minor crimes. Courts with jurisdiction over personal status matters are *Shari'ah* courts for Sunnî and Shi'î Muslims, *madhhab* courts for Druze, and *ruhî* courts for Christians and Jews. There is one single-*Qâdhî Shari'ah* court of first instance per district (except for Damascus and Aleppo, which have three each). Each of the three types of court has its own appellate courts. Final appeal lies with the Family Section of the Court of Cassation in Damascus. The Code of Personal Status is applied to Muslims by *Shari'ah* courts with separate tribunals for Druze, Christians and Jews.

Some relevant legislation is the following:

- Law of Personal Status 1953; the Ottoman Law of Family Rights continued to apply to matters of personal status until 1953. The Syrian Law of Personal Status 1953 covers matters of personal status, family relations and intestate and testamentary succession. Article 305 states that residuary source of law is the most authoritative doctrine of Hanafî school. The Syrian Law of Personal Status (*Qânûn al-Ahwâl al-Shakhsiyyah*) 1953 produced by the commission covers matters of personal status, family relations and intestate and testamentary succession and was the most comprehensive code issued in the Arab world up until then
- Civil Code 1949; various Egyptian laws were enacted from 1920 to 1946, and there was the unofficial code prepared by Egyptian jurist Qadri Pasha
- Code of Civil Procedure 1953
- Code of Civil Status 1957

- Law of Judicial Authority 1965.⁶⁴

6.13 Islamic Law in Iraq

Iraq, officially the Republic of Iraq, is a country in Western Asia spanning most of the northwestern end of the Zagros mountain range, the eastern part of the Syrian Desert and the northern part of the Arabian Desert. The capital city, Baghdad, is in the center of the eastern part. Iraq's rich history dates back to ancient Mesopotamia. The region between the Tigris and Euphrates rivers has been identified as the cradle of civilization and the birthplace of writing. During its long history, Iraq has been the center of the Akkadian, Assyrian, Babylonian and Abbasid empires and part of the Achaemenid, Macedonian, Parthian, Sassanid, Umayyad, Mongol, Ottoman and British empires. A multinational coalition of forces, mainly American and British, has occupied Iraq since an invasion in 2003 until 2009.

The Ja'farî and Hanafî are the predominant schools in Iraq. There are also Christian and small Jewish and Yezidi minorities.

Iraq has a mixed legal system that draws on both Sunnî and Shi'î *fiqh* for the law applied in *Sharî'ah* courts. The legal system as a whole also includes constitutional law, legislation and statutory provisions, usage and custom, judicial precedent and authoritative juridical opinions. Iraq, the birthplace of the Hanafî school of *fiqh*, came under Ottoman rule in the 17th century. From 1850 on a number of new civil, penal and commercial codes were adopted by the Ottomans, but the Ottoman Law of Family Rights 1917 was never implemented in Iraq since the Turks lost control over the region by the end of World War I when a British Mandate was established. The British administrators did not adopt the Family Law since it was not part of local law and because of the fact that Iraq had an almost equal proportion of Sunnî and Shi'î inhabitants.

A monarchy was established under King Faisal in 1921 following the Arab Revolt, and Iraq gained full independence from its Mandate status in 1932. A military coup in 1958 brought an end to the monarchy and Iraq became a republic.

The *Iraqi Law of Personal Status 1959* was based on the report of a commission appointed the previous year to draft a code of personal status and applies, according to Article 2, to all Iraqis except those specifically exempt by law, i.e. mainly Christian and Jewish minorities. The law provides that, in the absence of any textual provision, judgments should be passed on the basis of the principles of the Islamic *Sharî'ah*, in close keeping with the text of the law. Article 1 of the Civil Code also identifies Islamic

⁶⁴ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 138-41; Taha Mahmood, "Syria" in *Statutes of Personal Law in Islamic Countries*, pp. 39-41, 167-73.

Law as a formal source of law.

The provisional constitution was adopted on 22 September 1968 and came into effect on 16 July 1970. Article 4 of the current provisional constitution declares Islam the state religion.

Courts of Personal Status hear all cases involving Muslims, whether Iraqi or not. These Courts have jurisdiction over marriage, divorce, legitimacy, succession, *awqaf*, etc. *Shari'ah* courts operate independently of the regular courts. The Law of Personal Status 1959 is a unified code applicable to Shi'a and Sunni Iraqis. We should mention the Civil Code 1951 which was drafted by Abd al-Razzaq al-Sanhuri, an Egyptian jurist.⁶⁵

6.14 Islamic Law in Jordan

Jordan remained part of the Ottoman Empire until World War I and was then placed under an indirect form of British Mandate rule. The Ottoman legal system was retained; in 1927 many Ottoman laws (including the Ottoman Law of Family Rights 1917) were re-enacted with some alterations. The Hashemite Kingdom of Jordan was established as a fully independent state in 1947, with Islam as the state religion. The first constitution was adopted the following year, and the state embarked on the process of developing a national legal system to replace the vestiges of Ottoman rule. The 1952 Constitution declares Islam to be the state religion. It does not specify the sources of legislation as a whole, although in regard to the *Shari'ah* courts it states that "the *Shari'ah* courts in the exercise of their jurisdiction shall apply the rulings of the *Shari'ah* law." The Hanafi madhhab is the dominant school in Jordanian law.

In 1947 a provisional Law of Family Rights was enacted and remained in force until it was replaced in 1951 by the new Law of Family Rights. By this time the Palestinian territory of the West Bank had come under Jordanian rule, including East Jerusalem, and, until 1994, even during the Israeli occupation from 1967, the *Shari'ah* courts of the West Bank were under the authority of the Jordanian *Qadhî al-Qudhât* and applied Jordanian law.

A *Civil Code* and *Civil Procedure Code* were enacted in 1952 and 1953, the former replacing the Ottoman Majalla of 1876. The 1952 Civil Code was replaced in 1976, the new code drawing from Syrian legislation (which was in turn modeled on the Egyptian Civil Code of 1948). The same year the Jordanian Law of Personal Status replaced pro-

⁶⁵ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 111-5; Mustafa Ahmad al-Zarqa, *al-Madkhal al-Fiqhi al-Âm ila al-Fiqh al-Islamî* (Damascus: Dar al-Qalam, 1998), vol. I, p. 245-56; Taha Mahmood, "Iraq" in *Statutes of Personal Law in Islamic Countries*, pp. 15ff, 116-29; Zaid, *Reformation of Islamic Thought*, pp. 40-41.

viding for a more comprehensive code, while retaining reference to the classical Hanafi rules in the absence of a specific reference in the text. Discussions continue on the draft text of a new personal status law.

The *Jordanian legal system* draws on the Ottoman heritage in the communal jurisdiction of the religious courts of different communities over matters of personal status. In its civil court system it follows the French model. The *Shari'ah* courts are established in the constitution along with the religious tribunals of other recognized communities and include first instance courts with a single *Qâdhî* and the *Shari'ah* Court of Appeal. The other two categories of courts established in the constitution are the civil or regular courts (*Nizâmiyya*) and "special tribunals." The constitution grants the *Shari'ah courts* exclusive jurisdiction in matters of Muslim personal status. The precise jurisdiction of and procedure in the *Shari'ah courts* is defined in the Law of *Shar'î* Procedure 1959; the rules governing qualification and functions of *shar'î Qâdhîs* and lawyers are to be found in the Law of Organization of *Shari'ah* Courts 1972 and the Law of *Shar'î* Advocates 1952 respectively, both of which have been amended a number of times.⁶⁶

6.15 Islamic Law in Kuwait

The Ottoman Empire ruled present-day Kuwait as part of the Basra province since the late 17th century, and the Ottoman legal and judicial system functioning in Iraq was applied to Kuwaiti territory. However, the local rulers adhered to the Mâlikî School. In the late 19th century, a Treaty of Protection placed Kuwait under British extra-territorial control, and Kuwait became an administrative subdivision of British India. While the British did establish a Western-style judicial administration, it served only the non-Arab inhabitants of Kuwait. The Mâlikî School is the official *madhhab* in Kuwait. There is also a significant Ja'farî Shî'a minority.

The British protectorate of Kuwait ended in 1961, by which time Shaykh 'Abdullah al-Salim al-Sabah had begun the process of legal and judicial reform. The process of codification was initiated by the country's leaders during the early 1960s. In 1959 Shaykh 'Abdullah enlisted the services of the renowned Arab jurist Abd al-Razzaq al-Sanhuri, leading to the enactment of a number of codes inspired by Egyptian and French models. While matters relating to civil and commercial law and procedure were codified in the 1960s, it was not until the 1980s that the Civil Code 1980 and the Kuwaiti Code of Personal Status 1984 were enacted.

⁶⁶ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 119-22; al-Zarqa, *al-Madkhal al-Fiqhi al-Âm ila al-Fiqh al-Islâmî*, vol. I, pp. 245-56; Mahmood, "Jordan" in *Statutes of Personal Law in Islamic Countries*, pp. 20-24, 129-36.

The constitution was adopted on 11 November 1962. Article 2 states that “the religion of the State is Islam, and the Islamic *Shari’ah* shall be a main source of legislation.” Article 1 of the Civil Code also states that, in the absence of a specific legislative provision, judges are to adjudicate according to custom (*‘urf*) and, in the absence of an applicable principle of custom, be guided by the principles of Islamic jurisprudence (*fiqh*) most appropriate under the general and particular circumstances. Following the Iranian Revolution, Kuwait’s rulers stated that they would begin Islamizing the law and enacting laws that were fully in agreement with *Shari’ah*.

Under the 1959 Law Regulating the Judiciary, Kuwaiti courts are competent to hear all disputes concerning personal status, and civil, criminal and commercial matters. There are three levels of courts: courts of first instance (having several divisions, including personal status) in every judicial district; High Court (with five divisions, including personal status); and the Supreme Court (divided into the Division of High Appeal and the Cassation Division). For the application of personal status laws, there are three separate sections: Sunnî, Shi’î and non-Muslim (for the application of family laws of religious minorities). After judgments by the courts of first instance, appeals lie with the High Court, and then with the Cassation Division of the Supreme Court.⁶⁷

6.16 Islamic Law in Sudan

Sudan (officially the Republic of Sudan) is a country in north east Africa. It is the largest in the African continent and the Arab world and the bay area. The Mâlikî School was the predominant *madhhab* in Sudan, although the dominant school is now the Hanafî, due to Egyptian and Ottoman influence.

The *legal system* is based on English common law and Islamic law. Sudan came under Egyptian-Ottoman rule from the time of the Egyptian defeat of the Funj Kingdom in 1822. After the opening of the Suez Canal in 1869, European interest in the region increased; the British General Charles Gordon was appointed a governor of Egyptian Sudan in 1873. The Mahdist revolt led by Muhammad Ahmad al-Mahdi in 1880 led to the capture of Khartoum from the Egyptians in 1885. The British re-established control over the region in 1898 under General Horatio Kitchener. The British and Egyptians shared sovereignty during the Condominium period from 1899 on. An agreement to allow for a three-year transition period to independence in 1953 led to self-rule in 1956.

Civil war between the north and south continues to plague Sudan. Three ex-

⁶⁷ Abdullahi Ahmad an-Na’im, *Islamic Family Law in a Changing World*, pp. 123-25; al-Zarqa, *al-Madkhal al-Fiqhî al-Âm ila al-Fiqh al-Islâmî*, vol. I, pp. 245-56; Taha Mahmood, “Gulf” in *Statutes of Personal Law in Islamic Countries*, p. 85.

tended periods of military rule have been punctuated by briefer periods of multiparty parliamentary rule. The last elected government was suspended after a military coup on 30 June 1989. Sâdiq al-Mahdi was overthrown by the military and an Islamist coalition led by Lieutenant-General 'Umar al-Bashir and Dr. Hasan al-Turabi and martial law were imposed. As of 20 January 1991 the Revolutionary Command Council imposed Islamic law on all residents of the northern states regardless of religion.

On 1 July 1998, a new constitution came into force following a referendum the previous month. Lieutenant-General al-Bashir became president and Dr. al-Turabi became the speaker of parliament. On 12 December 1999, President al-Bashir dissolved Parliament and declared a state of emergency. In April 2000, the state of emergency was extended through to the end of 2000.

Sources of law are Islamic Law, the consensus of the population, the constitution, and custom. In family law, judicial circulars (*manshûrat*) issued by *Qâdhî al-Qudâ* (first issued in 1916) served to institute reforms or instruct application of particular interpretations. The Family Code was passed in 1991, codifying *Shari'ah* principles and interpretations of some *manshûrat* and abolishing others. Section 5 of the Code indicates Hanafî *fiqh* as the residual source of law; the Supreme Court (*Shari'ah* Circuit) is vested with the power to issue interpretations of the code⁶⁸

The *constitution* came into force on 1 July 1998, after being approved in a referendum the previous month; Article 1 states that Islam is the religion of the majority of the population but does not proclaim it to be the state religion; Article 65 identifies the sources of law as *Shari'ah*, the consensus of the people, the constitution, and custom. Prior to the enactment of the constitution, Sudan had largely been governed through a series of "constitutional decrees." Article 137 repealed all of the constitutional decrees except Constitutional Decree No. 14, which provides for implementation of the 21 April 1997 Peace Accord.

The court system consists of a Constitutional Court, a High Court, Court of Appeals and courts of first instance. During the Islamization campaign of 1983 the government reunified civil and *Shari'ah* courts, which had been divided during the colonial period. There is nothing in the new constitution to suggest that there has been a change in the treatment of *Shari'ah* in the courts.

- Relevant Legislation is the following:
- Constitutional Court Act 1998
- Muslim personal law Act 1991
- *Shari'ah* Courts Act 1967

⁶⁸ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 82-6; Otto, *Shari'a en Nationaal Recht*, pp. 113-36; Vikør, *Between God and the Sultan*, pp. 273-77.

- Judicial Authority Act 1971
- Organization of Laws Act 1973
- Judiciary Act 1976
- Local Courts Act 1977
- [September Laws; part of Ja'far al-Numayri's Islamization campaign during Sudan's previous period of military rule (1969-1985)]
- Civil Procedure Act 1983
- Civil Transactions Act 1983
- Criminal Procedure Act 1983
- Evidence Act 1983
- Judiciary Act 1983
- Penal Code 1983 (introducing *hadd* penalties)
- Sources of Judicial Decisions Act 1983
- Civil Code 1984
- Sudanese Criminal Act 1991 (reinstating *hadd* offences and law of *qisās* and *diyât*).⁶⁹

6.17 Islamic Law in Somalia

The Somali Republic was formed on 1st July 1960, upon the union of British Somaliland which gained independence on 26th June, and Italian Somaliland which gained independence from Italian-administered UN trusteeship on 1st July. Early legislation in British Somaliland was based on the importation of British-Indian legislation in the late 19th and early 20th century. The British promulgated later the Natives Betrothal and Marriage Ordinance 1928 and *Qâdhis'* Courts Ordinance 1937 specific to Somaliland. The Subordinate Courts Ordinance 1944 repealed 1937 Ordinance, limiting the jurisdiction of *Qâdhis'* Courts to matters of personal status. Under Italian rule in the south, there was a well developed system of *Qâdhis'* Courts which retained jurisdiction over civil and minor criminal matters.

Upon independence, the Republic was faced with the task of unifying legislation and judicial structures drawn from Italian, British, customary and Islamic legal traditions. After a military coup in 1969, the new regime embarked on a programme of legal reform based on scientific socialism. In the early to mid-1970s, debate regarding family law reform led to the appointment of a commission to prepare a draft code.

⁶⁹ Fluehr-Lobban, *Islamic Law and Society in the Sudan* (London: Frank Cass, 1987); Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 82-86.

The draft produced by the commission was enacted in 1975 with significant modifications made by President Siad Barre and the Secretary of State for Justice and Religious Affairs Abdisalem Shaykh Hussain. The Code aimed to abolish customary laws, and abrogated previous British and Italian era legislation relating to family law. Article 1 of the Family Code 1975 provides that the leading doctrines of the Shâfi'î school, and general principles of Islamic law and social justice are to serve as residuary sources of law.

Civil war ensued after the ousting of Barre in January of 1991, with competition for power between various factions. The collapse of the UN peacekeeping mission led to a final pullout of international troops in spring 1995. In August 2000, a majority of Somali leaders signed a transitional charter, to be in force for 3 years, and elected a parliament for the transition period. Fighting continues in the south with some orderly government established in the north.

The majority of Muslims are Shâfi'î. There is a small Christian minority. The current Constitution was adopted in August 1979. Article 3 (Section 1, Chapter 1) declares Islam the state religion.

After independence, the *sharî'ah* and customary courts were formally recognized as Courts of *Qâdhis*. Their judicial role is very small and jurisdiction is limited to civil matters such as marriage and divorce.

The regular court system is constituted at four levels: Supreme Court, courts of appeal, regional courts and district courts. District courts have two sections, civil and criminal. The civil section has jurisdiction over all cases arising from *sharî'ah* or customary law or civil cases where the matter in dispute does not exceed 3000 Somali shillings. Judges are directed to consider *sharî'ah* or customary law in rendering decisions. Regional courts are divided into three sections, civil and criminal (first instance), assize, and labor. Courts of appeal are divided into two sections: general appeals and assize appeals.⁷⁰

6.18 Islamic Law in Kenya

Republic of Kenya is a republic in eastern Africa; achieved independence from the United Kingdom in 1963; major archeological discoveries have been made in the Great Rift Valley in Kenya.

European colonial interest in Kenya began with Portuguese efforts to establish safe ports in the area of Mombasa from 1498. The Omanis captured Mombasa in 1696. British interests in the East African region in the mid to late 19th century led to

⁷⁰ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 79-81.

the formation of the British East Africa Company. In 1895, within a decade of the founding of the East Africa Company, the area from the coast to the Rift Valley was declared the British East Africa Protectorate. Kenya gained independence in June 1963. Under the British protectorate, Kenya had parallel legal systems with African courts applying customary law, and appeals lying with the African Appeal Court, then with the District Officer and then a Court of Review. Muslim personal law was applied by Courts of *Liwalis*, *Mudirs* and *Qâdhis*, with appeals lying with the Supreme Court (renamed the High Court after independence). The process of integrating the judicial system began in 1962 when powers of administrative officers to review African Courts' proceedings were transferred to magistrates. The process was completed by the passage of two acts in 1967. The Magistrates' Courts Act 1967 abolished African Courts and the Court of Review and established District and Resident Magistrate's Courts and a High Court. The *Qâdhis*' Courts Act 1967 established six *Qâdhis*' Courts for the application of Muslim personal status law.

In 1967, two Presidentially-appointed commissions began looking into marriage and divorce law and inheritance law. The commissions produced drafts of uniform family and inheritance codes to replace the existing customary, statutory, Islamic and Hindu laws then in force. The commission dealing with inheritance laws recommended a uniform code applicable with certain exceptions for customary laws. The bill based on its recommendations led to much heated debate. Criticisms included that the proposed law was too foreign, anti-Muslim, and afforded too many rights to women and illegitimate children. The bill was eventually passed in 1972. The marriage and divorce laws commission produced a draft code that was as uniform as the commission deemed feasible, but since the 1970s efforts to enact a uniform marriage law have been unsuccessful. Marriage law continues to be governed by several regimes: civil, Christian, Hindu and Muslim marriages are governed by separate legislation and communal laws and customary law marriages are also afforded official recognition.

The protectorate-era legislation relating to application of Muslim personal law has been retained. The Acts in force basically afford recognition to marriages solemnized under Islamic law, provide for the registration of Muslim marriages and divorces, delineate the jurisdiction and procedure of *Kadhis*' Courts and instruct the application of the principles of personal law applicable to the parties involved, without substantive codification of that law.

Kenya has a very diverse Muslim population due to Arab and South Asian settlement, local conversion and intermarriage, thus various schools represented. The majority is Shafi'i, and there are also sizeable Hanafi communities as well as Ja'fari, Isma'ili, Zaydi and Ahmadi minority communities.

The Constitution was adopted on 12th December 1963, and has been amended several times; most notably in 1964 when Kenya became a Republic and in 1991 when

a multiparty system was restored. The Constitution does not provide for any official state religion. Article 66 (1) to (5) provides for the establishment of *Qâdhis'* Courts.

Local courts applying customary law were abolished in 1967 when reform and unification of the judiciary was completed. There are four levels of courts: Resident and District Magistrates' Courts (1st, 2nd and 3rd classes), Senior Resident and Chief Magistrates' Courts; a High Court, and the Court of Appeal.

Islamic law is applied by *Qâdhis'* Courts where "all the parties profess the Muslim religion" in suits relating to "questions of Muslim law relating to personal status, marriage, divorce or inheritance". There are eight *Qâdhis'* Courts in Kenya, presided over by a Chief *Qâdhi* or a *Qâdhi* appointed by the Judicial Services Commission. Appeals lie to the High Court, sitting with the Chief *Qâdhi* or two other *Qâdhis* as assessor(s).⁷¹

6.19 Islamic Law in Ethiopia

Ethiopia was occupied by Italy from 1936 to 1941, although Eritrea came under Italian rule from 1886 to 1941. During WWII, the British defeated the Italians and established a protectorate over Eritrea. The 1950 UN Resolution to unify Eritrea and Ethiopia was implemented in 1952. The movement for Eritrean independence developed into an armed struggle in 1961. A Civil Code passed in 1960 governs civil, religious and customary law marriages. Emperor Haile Selassie I (1930-1974) attempted to modernize the state, but the nation was struck by famine and a long-standing conflict with Eritrea; both factors are considered to have contributed to the 1974 military coup ending Selassie's rule.

Lieutenant Col. Mengistu Haile Mariam became the head of state and the government was oriented towards Marxism. All religions, including Ethiopian Orthodox Christianity, were officially placed on equal footing under new regime. The Eritrean People's Liberation Front won several strategic successes against Ethiopian in late the late 1980s and early 1990s, declaring the Provisional Government of Eritrea in May 1991. At the same time, 17 years of military rule under a junta ended in 1991 amidst growing pressure from democratic opposition forces. From 1991 to 1995 a Transitional Government, a coalition of 27 political parties, ruled Ethiopia. A 1993 referendum in Eritrea resulted in a massive vote for independence.

A new Ethiopian Constitution was adopted in 1994 and elections were held in 1995 leading to election of Meles Zenawi as Prime Minister and Negasso Gidada as President. Federal Democratic Republic of Ethiopia established in August 1995.

The majority of Muslims are Shâfi'î. The other major religion is Ethiopian Ortho-

⁷¹ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 54-56.

dox (or Monophysite) Christianity. There are also small Jewish and Animist minority communities.

The current Constitution was adopted in 1995. Article 34 (on Marital, Personal and Family Rights), section 5 states: "This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute." Article 78(5) also provides for the establishment or recognition of religious or customary courts, pursuant to Article 34(5).

Regular courts are organized at four levels. The Supreme Court has appellate jurisdiction and sits in Addis Ababa. The High Courts sit in the 14 provincial capitals have original and appellate jurisdiction. The *awraja* courts are convened in each of the 102 administrative subdivisions. Woreda courts are established in each of the 556 districts.

Under the 1944 legislation, *sharī'ah* courts are organised into three levels: Naiba Councils serve as courts of first instance, *qadhis'* Councils as intermediate courts and the Court of *sharī'ah* as highest court.

Sharī'ah courts have jurisdiction in two kinds of cases. The first are: marriage, divorce, maintenance, guardianship of minors, and family relationships; provided that the marriage to which the case pertains was concluded under Islamic law or the parties are all Muslims. The second are: cases concerning *awqaf*, gifts, succession, or wills, provided that donor is a Muslim or deceased was a Muslim at the time of his/her death.

Sharī'ah courts have unclear legal status as the Muhammadan Courts Act 1944 establishing them was never actually repealed and yet the 1960 Civil Code makes no exceptions for Muslims or Muslim personal law. The Court of *Sharī'ah* continues to sit as a division of the Supreme Court.⁷²

6.20 Islamic Law in Algeria

Algeria (al-Jazâ'ir, officially the People's Democratic Republic of Algeria, is an Arabic country located in North Africa. It is the largest country on the Mediterranean Sea, the second largest on the African continent. The Mâlikî School is the predominant *madhhab* in Algeria. There is an Ibâdhî minority and small Christian and Jewish minorities.

The Algerian legal system is based on French and Islamic law. Algeria remained under French rule for 132 years, constituting the longest direct European colonization

⁷² Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 76-78.

of any region in North Africa. After a brutal eight-year struggle for independence, Algeria became a sovereign state in July 1962.

Under French rule, courts applied Mâlikî principles in matters relating to personal status and succession (unless the parties were Ibâdhî). Commentators note that the process of adjudication and interpretation in the Franco-Algerian courts led to distinctive developments in the area of family law. In 1916, a commission headed by the French jurist Marcel Morand was appointed to formulate a draft code of Muslim law. The draft code, *Avan-project de code du droit Musûlman Algerien*, based mainly on Mâlikî principles but incorporating some non-Mâlikî (mainly Hanafî) provisions, was never formally passed into law although it did influence the application and administration of family law in Algeria. The government eventually issued a Marriage Ordinance in 1959, enacting some Mâlikî principles relating to family matters; the Ibâdhî minority was initially exempted from the ordinance. The legislation may have been inspired by the codification of family law in Tunisia and Morocco in 1956 and 1958 under newly independent national governments. Although the Marriage Ordinance did not introduce substantial changes to family law, there were some provisions based on Hanafî principles. The Ordinance established rules for the solemnization and registration of marriage, raised the minimum marriage age for both parties, and established certain regulations relating to judicial dissolution and court orders for post-divorce relief. Its application was specific to those who registered their option for state legislation.

The *first* constitution promulgated in 1964 declared Islam to be the state religion. The new regime also amended the Marriage Ordinance of 1959, repealing or amending certain provisions, such as the exemption of *Ibadhî* marital relations from the terms of the ordinance and the minimum marriage age. The *second* constitution adopted in 1976 reaffirmed Islam as the state religion. Periodic demands for the comprehensive codification of personal status and inheritance laws eventually led to a draft code being presented to the National Assembly in 1980. After several years of debate, discussion and protest, the Family Code was enacted in 1984.

The current *constitution* was adopted on 19 November 1976 and has been amended several times, with the last revisions approved by referendum in November and signed into law in December 1996. Article 2 provides that Islam is the religion of the state.

The *judiciary* in Algeria is organized into three levels. *Daira* tribunals (numbering 183 in the late 1980s) are the courts of first instance for civil and certain criminal matters. The 48 *Wilaya* Courts in each province are organized into four chambers (civil, criminal, administrative and accusation) and are constituted by three-judge panels that must hear all cases. In civil suits, these courts have appellate jurisdiction over the decisions of lower courts. The highest level of the judiciary is the Supreme Court (with

a Private Law chamber for civil and commercial cases, Social Division for social security and labor cases, a Criminal Court and an Administrative Division).⁷³

6.21 Islamic Law in Tunisia

Tunisia (officially the Tunisian Republic) is a Berber-Arab country located in North Africa. The Mâlikî School is the predominant *madhhab* in Tunisia.

The legal system is based on the French civil law system and Islamic Law. During the time that it was an autonomous province of the Ottoman Empire from 1574 on, Hanafî *fiqh* was influential but never displaced the position of the Mâlikî School. Tunisia became a French Protectorate in 1881 and attained full independence in March 1956. The Law of Personal Status (LPS), inspired by unofficial draft codes of Mâlikî and Hanafî family law, was passed soon after independence. The LPS was extended to apply to all Tunisian citizens in 1957, thus ending the application of rabbinical law to Jewish personal status cases and the French Civil Code to personal status cases relating to non-Muslim Tunisians. Among the most controversial provisions of the LPS were those banning polygamy and extrajudicial divorce.

The constitution was adopted 1 June 1959. Article 1 declares Islam to be the state religion, and Article 38 provides that the president of the republic must be a Muslim. *Sharî'ah* courts were abolished in 1956. There are four levels of courts in the judiciary. Cantonal courts have limited criminal jurisdiction. Courts of first instance have civil, commercial, correctional, social and personal status chambers. Three courts of appeal (in Tunis, Sousse and Sfax) have civil, correctional, criminal and accusation chambers (the final one being similar to a grand jury). The Court of Cassation in Tunis is the highest court of appeal, with three civil and commercial chambers and a criminal chamber.⁷⁴

6.22 Islamic Law in United Arab Emirates

The UAE is a federation of seven emirates: Abu Dhabi, Sharjah, Ajman, Fujayrah, Umm al-Qawain, Dubai and Ra's al-Khaymah. The sources of law are Islamic law, constitutional law, and legislation.

The area now known as the United Arab Emirates was known as the *pirate coast* by the early 19th century. Beginning in the 1820s, the British entered into a number of

⁷³ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 164-8; Alan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton: Princeton University Press, 1985).

⁷⁴ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 182-6.

treaties with local rules in order to protect their shipping interests. A perpetual maritime truce signed in 1853 gave the British remit over handling of foreign relations for the region. Full independence was attained in December 1971, with Ra's al-Khaymah, the last Emirate to join the federation, becoming a part of the union the following year.

The majority of Emirati nationals are Sunnî Muslim; there is a significant Shî'a minority, as well as small Christian and Hindu minorities. The federation has a very high proportion of expatriates.

Article 7 of the Provisional Constitution, adopted 2 December 1971 and made permanent in 1996, declares Islam to be the official state religion of the union and that Islamic *sharî'ah* will be a principal source of legislation.

The Abu Dhabi Courts Law 1968 regulates the jurisdiction of *sharî'ah* courts, although personal status law remains uncoded. The other six emirates do not have similar legislation or organized judiciaries, so *sharî'ah* courts are not regulated. Important civil and criminal cases are brought before the ruler in person.

The Sharjah Courts Law 1971 created civil courts competent to hear commercial and labour disputes, with limited criminal jurisdiction. The Law Establishing the Union Supreme Court 1973 and the Union Law 1978 established the Union Courts of First Instance and Appeal and transferred jurisdiction from tribunals in Abu Dhabi, Sharjah, Ajman and Fujayrah to these courts. Union Courts of First Instance deal with civil, commercial and administrative disputes, including personal status cases, arising in the permanent capital.⁷⁵

6.23 Islamic Law in Yemen

Yemen (officially the Republic of Yemen) is an Arab country located in the Arabian Peninsula in southwest Asia. Islamic caliphs began to exert control over the area in the 7th century. After the caliphate broke up, the former North Yemen came under the control of Imâms of various dynasties, usually of the Zaidî sect, who established a theocratic political structure that has survived until modern times. Egyptian Sunnî caliphs occupied much of North Yemen throughout the eleventh century. By the sixteenth century and again in the nineteenth century, North Yemen was part of the Ottoman State, and its Imâms exerted control over South Yemen for a long time.

In 1839 the British occupied the port of Aden and established it as a colony in September of that year. They also set up a zone of loose alliances (known as protectorates) around Aden to act as a protective buffer. North Yemen gained independence

⁷⁵ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 142-3.

from the Ottoman Empire in 1918 and became a republic in 1962. In 1967 the British withdrew and gave Aden back to Yemen due to the extreme pressure of battles with the North and its Egyptian allies. After the British withdrawal, this area became known as South Yemen. The two countries were formally united as the Republic of Yemen on 22 May 1990. The Shâfi'î and Zaidî schools are the predominant *madhâhib* in Yemen.

Following the unification of the two Yemens, Republic Decree Law no. 20, constituting the *Yemeni Law of Personal Status*, was passed in 1992. The legislation followed a presidential decree abolishing the 1978 code of personal status of the Yemeni Arab Republic and the 1974 code of personal status of the People's Democratic Republic of Yemen. The post-unification Law of Personal Status closely resembles the former Yemeni Arab Republic's legislation. Article 349 provides that the strongest proofs in the Islamic *Shari'ah* are to serve as the residual source of law in the absence of specific textual provision. The penal law of the unified Yemen also provides for the application of *hadd* penalties for certain crimes, although such penalties are not often applied in practice.

The Constitution was adopted on 16 May 1991 and amended 29 September 1994. Article 1 declares Yemen an "Arab Islamic State" and Article 2 declares Islam to be the official state religion. Article 3 states that "Islamic *Shari'ah* will be the source of all legislation." Article 23 states that inheritance is regulated by *Shari'ah*. Article 26 states that the family is the basis of society and its pillars are religion, custom and love of the homeland. Article 31 states that women have rights and duties that are guaranteed and assigned by *Shari'ah* and stipulated by law.

Courts of first instance in each district have jurisdiction over personal status, civil, criminal and commercial cases. Appeals go to the Courts of Appeal in each of the 18 provinces with civil, criminal, matrimonial and commercial divisions, each consisting of three-judge benches. The Supreme Court is the highest court of appeal and sits in San'a. It has eight divisions: constitutional, appeals scrutiny, criminal, military, civil, family, commercial and administrative.⁷⁶

6.24 Islamic Law in Turkey

Turkey (*Türkiye*), known officially as the Republic of Turkey (*Türkiye Cumhuriyeti*), is a Eurasian country that stretches across the Anatolian peninsula in western Asia and Thrace (*Rumelia*) in the Balkan region of southeastern Europe. Due to its strategic location astride two continents, Turkey's culture has a unique blend of Eastern and Western traditions. A powerful regional presence in the Eurasian landmass with strong historical, cultural and economic influence in the area between Europe in the

⁷⁶ Abdullahi Ahmad an-Na'im, *Islamic Family Law in a Changing World*, pp. 144-47

west and Central Asia in the east, Russia in the north and the Middle East in the south, Turkey has come to acquire increasing strategic significance.

Turkey is a democratic, secular, unitary, constitutional republic whose political system was established in 1923 under the leadership of Mustafa Kemal, following the fall of the Ottoman State in the aftermath of World War I.⁷⁷

The legal history of Turkey until 1923 is the legal history of at least thirty Muslim states because the Ottoman State governed many of these states. For this reason, we can state that the legal system during the Ottoman State was *Shari'ah*, but after Mustafa Kemal no trace of Islamic Law in Turkey remained. Now all regulations and legislation are completely similar to the European legal system.

Despite the fact that 99.8 per cent of the population is Muslim, the legal system in Turkey is completely secular. The religion is not mentioned in the Constitution at all and is not afforded the status as a source of law for the relevant legislative bodies nor in respect of judicial reasoning by the national tribunals.⁷⁸

⁷⁷ See Otto, *Shari'a en Nationaal Recht*, pp. 145-73.

⁷⁸ Akgunduz and Cin, *Türk Hukuk Tarihi*, v. I, pp. 136-50; Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study*, (London: BIIICL, 2008), p. 44.

7 THE SYSTEM AND METHODOLOGY OF ISLAMIC LAW

7.1 The System of Islamic Law

A legal system in actual operation is a complex organism in which structure, substance, and culture interact. From the point of view of “system”, which means the arrangement and classification of legal rules according to the relationships set by positive law, the system of Islamic Law is a special one. Islamic Law is truly an original system, having a particular system of arrangement and classification. All books of Islamic law follow a system that was more important and practical for ancient jurists, instead of the separation between public and private laws based on Roman law. In fact, an effort was made to establish a legal and logical link between books, chapters and sections in the written works. Since Islamic Law is not secular in nature, the devotions that arrange the rules between Allah and His servants have also been studied within the legal system.¹

Most books on Islamic law were compiled according to methodologies that may be ascribed to each school of law, which represent distinctive modes of compilation. Some legal topics were placed in differing order, depending on the particular school. But the differences are not huge. We could summarize the ways in which *fiqh* is divided as follows:

The Hanafī school	<i>‘Ibādāt</i> (Devotions); <i>Munākahāt</i> (Marriage); <i>Mu‘āmalāt</i> (Civil Law); <i>‘Uqûbāt</i> (Penal Law).
The Shāfi‘ī School	<i>‘Ibādāt</i> (Devotions); <i>Mu‘āmalāt</i> (Civil Law); <i>Munākahāt</i> (Marriage); <i>‘Uqûbāt</i> (Penal Law); Disputes (<i>Qadhā</i>).
The Mālikī School	<i>‘Ibādāt</i> (Devotions); <i>Munākahāt</i> (Marriage); <i>Mu‘āmalāt</i> (Civil Law); <i>‘Uqûbāt</i> (Penal Law); Disputes (<i>Qadhā</i>).
The Hanbalī school	<i>‘Ibādāt</i> (Devotions); <i>Mu‘āmalāt</i> (Civil Law); <i>Munākahāt</i> (Marriage); <i>‘Uqûbāt</i> (Penal Law); Disputes (<i>Qadhā</i>).

¹ Cf. Jasser Auda, *Maqâsid al-Sharī‘ah as Philosophy of Islamic Law: A Systems Approach*, (London: The International Institute of Islamic Thought, 2008), pp. 46-55.

Now we shall give some brief information about the Islamic legal system on which *Majalla* was also based.

The earlier Islamic law was classified into four major groups, which are as follows.

1) *'Ibâdât* (Devotions=Worship). These are mentioned at the beginning of books on law and contain rules on devotions that are related to life in the hereafter. However, the rules regarding the *zakâh* (poor tax, alms), which is regarded as devotion, also form a noteworthy part of Islamic finance law. Briefly, this chapter deals with the relations between Allah and His Servants. The other three chapters focus on inter-human relations.

2) *Munâkahât* (Marriage). This constitutes rules concerning family law, dealing with issues like marriage, divorce, guardianship, tutelage, lineage, alimony, etc., but not inheritance law.

3) *Mu'âmalât* (Civil Law). *Mu'âmalât* is the most comprehensive chapter of earlier Islamic law. Despite the fact that *Majalla* introduced family law as a separate chapter, earlier jurists deemed *Munâkahât* to be a sub-branch of this chapter. *Sharī'ah* rules that arrange all the relations among people for the sake of the balanced and regular continuation of social life are called *Mu'âmalât* decrees. Provisions concerning - which today fall under private law - the law of obligations, property law, law of persons in part, commercial law and private international law, and - falling under public law - general international law and procedural law were studied in the chapter on *Mu'âmalât* (Procedures). This subject was studied separately among the provisions of the inheritance law, *Mu'âmalât* (Procedures) or under *Ilm al-Farâ'idh* (Science of inheritance law). Islamic jurists in recent times placed international law under *Siyar*, the provisions regarding the constitution or administrative law under *Ahkâm al-Sultâniyyah* (Sultan's Decrees) or *Siyâsah al-Shar'iyyah* (Sharī'ah Politics).²

4) *'Uqûbât* (Penal Law), the Islamic Penal Codes.³

We also wish to draw particular attention to an Abstract Division, which is given content from the point of view of the history of Islamic Law. Of the aforesaid legal rules, those that are based upon the Noble Qur'an and the *Sunnah* (Traditions of

² Cf. Irshad Abdal-Haqq, "Islamic Law: An Overview of its Origin and Elements," Hisham M. Ramadan, *Understanding Islamic Law: from Classical to Contemporary*, (Lanham: Rowman Altamira, 2006), pp. 22ff.

³ *Majalla*, Article I; Ali Haydar, *Durar al-Hukkâm Sharhu Majalla al-Ahkâm*, (trans. into Arabic by Fahmi al-Husayni) vol. I (Beirut: D al-Kutub al-'ilmiyyah, n.d), pp. 15-21; Zerka, *Al-Fiqh al-Islamî fi Thawbihal-Jadid*, vol. I, pp. 61ff; Akgündüz, *Kulliyât*, pp. 59-60; Muhammad Amin ibn 'Âbidîn, *Radd al-Muhtar*, vol. I (Cairo: Maktaba al-Halabî, 1966), 1/79; Karaman, *Mukayeseli İslâm Hukuku* (Comparative Islamic Law), (Istanbul: 1974), vol. I, pp. 20-28; Abdulkarim Zaidan, *al-Madkhal Li Dirâsah al-Sharī'ah al-Islâmiyyah* (Baghdad: 1977), pp. 57-61; Mawil Izzi Dien, *Islamic Law: from Historical Foundations to Contemporary Practice* (Edinburgh: Edinburgh University Press 2004), pp. 25-27.

Prophet Muhammad) and are included in books of *fiqh* (Islamic jurisprudence) are called *shar'*, *shar' al-sharîf* or *Sharî'ah* law. On the other hand, certain regulatory dispositions concerning the constitution and administrative law called *Siyâsah al-Shar'îyyah* or *Ahkâm al-Sultâniyyah*, codices that are arranged concerning especially financial law, land law and *ta'zîr* penalties based on the limited legislative power recognized by *Sharî'ah* rules, and rules of *Ijtihâd* (interpretation) based on usages and public interest are treated under *Public Law*, *Politics*, or *Law*.

Some scholars have divided *Sharî'ah* law into two main sections.

First are the acts of worship, or *al-ibâdât*; these include:

- Ritual Purification (*wudhu'*)
- Prayers (*salâh*)
- Fasts (*sawm* and *Ramadhan*)
- Charities (*zakâh*)
- Pilgrimage to Mecca (*hajj*).

The second covers instances of human interaction, or *al-mu'âmalât*:

- Financial transactions, contracts
- Endowments
- Laws of inheritance
- Marriage, divorce and child care
- Foods and drinks (including ritual slaughtering and hunting)
- Penal punishments
- Warfare and peace
- Judicial matters (including witnesses and forms of evidence).

Although it might be deemed reasonable at first glance to expect that the information concerning the history of Islamic Law is given on the basis of the aforementioned division, it would be better, in our view, for didactic purposes to introduce the developments and brief rules in the history of Islamic Law as a separation between public law and private law, which is deemed appropriate in contemporary law. For this reason, we will present the rest of this discussion in two other books, the first of which will be composed of the information on public law while the second will be consist of information on and the historical development of private law. In the meantime, in each branch of law, the basic principles of both *Sharî'ah* law and public law will be explored. In addition, the noteworthy legal activities in the history of Islamic Law will also be elaborated separately. Our purpose is to give students and researchers enlightening data on how Islamic legal life of 1429 years developed from the pers-

pective of legal rules and institutions.

We would like to quote Article 1 of *Majalla* in relation to this:

The science of Islamic law (*fiqh*) consists of knowledge of the precepts of the Divine Legislator in their relation to human affairs.

The questions of Islamic law either concern the next world, being known as rules relating to worship, or to this world, being divided into sections dealing with domestic relations, civil obligations and punishments. Thus Allah decreed the continuation of the world until the appointed time. This, however, can only occur by mankind being perpetuated, which is dependent upon marriage of male and female with a view to procreation. Moreover, the continuation of the human species is assured by individuals association together. Man, however, in view of the weakness of his nature is dependent upon food, clothing, housing and the industries for his subsistence. In other words, in view of the fact that man is a civilized being, he cannot live in attitude like the other animals, but is in need of co-operation and association in work with his fellowmen in order to live in a state of civilization. Every person, however, asks for the things which he likes and avoids things which are disagreeable to him. As a result, it has been necessary to establish laws of a nature likely to maintain order and justice as regards marriage, mutual help and social relations, which are the basis of all civilizations.

The first division of Islamic law is the section dealing with domestic relations. The second is the section dealing with civil obligations. In view of the fact that the continuance of civilization on this basis necessitates the drawing up of certain matters relating to punishments, the third section of Islamic jurisprudence deals with punishments.

As regards the section dealing with civil obligations, the questions which are of the most frequent occurrence have been collected together from reliable works and set out in this Code in the form of Books. These Books have been divided into Chapters and the Chapters into Sections. The questions of detail which will be applied in the courts are those questions which are set out in the following Chapters and Sections. Islamic jurists, however, have grouped questions of Islamic law under certain general rules, each one of which embraces a large number of questions and which, in the treatises on Islamic jurisprudence, are taken as justification to prove these questions (sic).⁴

System theorists have distinguished between open and closed systems. The open systems are living systems, but closed systems are static. The system of Islamic Law is an open system. As is well-known, a few jurists are calling for the gate of *Ijtihād* to be closed on the *usûl* level, which would transform Islamic Law into a closed system. But all recognized Islamic schools of law and the vast majority of jurists over the centuries have decided that *Ijtihād* is necessary for Islamic Law.⁵

⁴ Ali Haydar, *Durar al-Hukkâm*, vol. I, pp. 15-16; *al-Majalla al-Ahkâm al-Adliyyah* (The Ottoman Courts Manual (Hanafî)), Article 1; http://www.iiu.edu.my/deed/lawbase/al_majalle/al_majalleintro.html (1 of 7).

⁵ Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*, pp. 47-48.

Before proceeding to the first book, it will be useful to give brief information on the method of codification in early Islamic law.

7.2 A Brief History of Codification in Islamic Law

Codification is the process of collecting and restating the law of a jurisdiction in certain areas, usually by subject, forming a legal code, i.e. a codex (book) of law. The first civilization to codify its laws was ancient Babylon. The first real set of codified laws, the Code of Hammurabi, was compiled *circa* 1760 BC by the Babylonian king Hammurabi, and is the earliest known civil code. Besides religious laws such as the Torah, important codifications were developed in the ancient Roman Empire, with the *Corpus Iuris Civilis*. The first *permanent* system of codified laws could be found in China, with the compilation of the *Tang Code* in CE 624. A very influential example in Europe was the French Napoleonic code of 1804.

Muslim scholars have described the period of *mujtahidîn* (738-960) as "the Golden Age of Islamic Law," "The Age of the Codification of *Fiqh*," and the "Blossoming Age of *Fiqh*." The *tadwîn* means codification. *Al-Mudawwanah al-Kubrâ* should be understood as "the greatest codification of Mâlikî school". The full literary period of Islamic law started at the end of the 8th century. Apart from the legal books by Shaibânî and Abu Yusuf, some other works such as *Muwatta'*, the *Umm* and the *Majmû'* entered the picture, marking a new era of the legal writing. Some of al-Shaibânî's works can be demonstrated as corpus, especially the *al-Mabsû't* from *Zâhir al-Riwâyah* corresponds to the *Corpus Iuris Civilis*⁶ by Justinian I. Just like Tribonian⁷ and his colleagues, al-Shaibânî and Abu Yusuf certainly deserve to be called state jurists. We know that Harun al-Rashîd has promoted Abu Yusuf about composing *Kitâb al-Kharâj*.⁸

Islamic law is certainly general and exhaustive and it dates from the first centuries of Islam. According to Muslim Scholars and Muslim communities, the wide-ranging interest in the codification of the heritage of *fiqh* (Islamic jurisprudence) accentuates two points.

1. The Islamic *Sharî'ah* is a living and valid law that is applicable at all times and in all places, with all that it embraces of flexibility, vitality and capacity for development

⁶ The *Corpus Iuris* (or *Iuris*) *Civilis* ("Body of Civil Law") is the modern name for a collection of fundamental works in jurisprudence, issued from 529 to 534 by order of Justinian I, Eastern Roman Emperor.

⁷ Tribonian (c. 500–547) was a jurist during the reign of the Emperor Justinian I, who revised the legal code of the Roman Empire.

⁸ Benjamin Jokisch, *Islamic Imperial Law: Harun-al-Rashid's Codification Project*, (Berlin: Gruyter GmbH, 2007), p. 279ff.

regarding the exposition of rulings for the new life situations according to the fixed principles, totality, and objectives of *Sharī'ah*. This is the realistic, dynamic *fiqh*.

2. The Islamic *Sharī'ah* is the source of legislative independence – independence that we consider inevitable for the preservation of the identity of the *Ummah* and its cultural peculiarity. Indeed, the independence of an *Ummah* cannot be fulfilled if such an *Ummah* has replaced its eternal *Sharī'ah* with imported laws. Moreover, there are only three avenues of escape from the current crisis for the *fiqhī* (jurisprudential) Muslim mentality: thorough adherence to the absolute (conclusive) text, increasing employment of *Ijtihād* (personal reasoning), and conscious respect for reality.⁹

We could say that 'Abbasids codified Islamic Law. The state jurists Shaybânî and Abu Yusuf produced an imperial code that consisted of six parts (*Kutub Zâhir al-Riwâyah*). This code was presented as part of the Islamic law and intended to be more or less binding for the Muslims in the Caliphate. As we have mentioned before, the first legal arrangement on hand is a legal code on private law called *al-Masâil al-Mâlikshâhiyah Fil-Qawa'id al-Shar'iyyah*, which was prepared by the Seljuqid Sultan Malikshah in (485/1092),¹⁰ and was followed later by *Fatâwâ al-Tatarkhâniyyah*. But we should not forget Nizâm al-Mulk who prepared his voluminous treatise on Islamic politics called *Siyâsatnâmah* (The Book of Government).¹¹

The *Memoirs* and *Institutes* (*Malfûzât* and *Tuzukât*) of Temur first appeared in Persian. These two works were supposed to have been dictated originally by Temur himself. Alamgir I was the ruler, the sixth, of the Mughal Empire from 1658 until his death and he espoused an interpretation of Islam and a behavior based on the *Sharī'ah* (Islamic Law), which he set about codifying through edicts and policies. Aurangzeb took a personal interest in the compilation of the *Fatâwâ-e-Alamgiri* or *Fatâwâ Hindīyyah*, a digest of Muslim law.

The codification that started in the era of the Anatolian Seljuqids and continued in the Ottoman State were the essential legal arrangements that were taken as the official basis at the courts and at the other state offices, including those legal codes of Fâtih (the Conqueror), Qânûni (the Lawmaker), Tawqî'î Abdurrahman Pasha (1087/1676), Ahmed III and Murad IV should certainly not be overlooked. In point of fact, these legal codes and the books of Islamic jurisprudence (*Qânûnnâme*, *Qawânîn*) were accepted as the written legislation of the Ottoman State until *Tanzîmât* (The Reforms). We could say that before proclamation of the imperial decree of 1839, there existed two different forms of codification in the Ottoman State, collections of *fatwâs* and *qanunnâmes* (legal codes). In each case compilations made by different

⁹ Muḥammad Sa'ād 'Ashmâwî, *Islam and the Political Order*, (Washington: CRVP, 1994), pp. 95ff.

¹⁰ The Committee, *al-Urûdah Fi'l-Hikayah al-Saljuqiyyah* (Istanbul: MTM), vol.2, pp. 249ff.

¹¹ Jokisch, *Islamic Imperial Law*, p. 619.

authors from time to time and distributed throughout Ottoman state. The fatwās were classified according to their contents on the basis of the *sharī'ah* and pasted in notebooks under different chapters and headings. They were then collected in four large volumes and preserved in the *Fatwā-khāne*, the special burou which assisted the mufti in preparing decisions until abolition of the office of the *Sheikh al-Islam*.¹²

The Ottoman jurists have made use of their opinions and of their customs ('urf) only in fields where the *sharī'ah* had been silent. For example, the first penal code in Ottoman State was introduced simply because there were no definite penalties for some crimes (*ta'zīr*) in the *sharī'ah*. The right to determine such penalties was granted to the *ulu al-amr* (Sultan and other statesmen). Similarly, through legal invasions the *sharī'ah* law for agricultural land were replaced by the introduction of *Arazi Qanunu* (land law), inspired by and in conformity with the 'urf.¹³

The codification in its modern meaning started with the proclamation of *Khatt-i Sharīf of Gulkhāne*, 1839, which marks the beginning of the *Tanzīmât* in the Ottoman state. This decree of reform, published by the government, indicates that a new order had replaced the old. The factors which played a role in this fundamental change included governing social and economic relations, the strengthening of the central government, and the trends towards bringing the law in accord with new circumstances. In the nineteenth and twentieth centuries, there were numerous attempts to resurrect and implement Islamic law in many Muslim countries, especially in Ottoman State. Demands for the official codification of Islamic *fiqh* in the modern sense began during the last years of the Ottoman state, which laid the foundations of this crucial step by calling it *Majalla al-Ahkâm al-'Adliyyah*, a codification of the Hanafī school of law, especially its civil and judiciary aspects, during the period 1286-1293 A.H. We will give detailed information about this when discussing Islamic Contracts Law.¹⁴

The *Majalla al-Ahkâm al-'Adliyyah* (Legal Rulings) constitutes the first attempt at laying down an integrated juristic collection that applies to both the substantive and procedural aspects and is derived directly from *Sharī'ah* and formulated by a number of major scholars of the Hanafī madhhab. The appearance of the first issue of this journal on 26 Sha'ban, 1293/1876, lends prominence to that day, making it a memorable day in the history of modern Islamic legislation. Moreover, *Majalla al-Ahkâm al-'Adliyyah* embodies a comprehensive set of *Sharī'ah* transactions or, more precisely, of Islamic civil laws. Yet it is incomplete because it does not encompass the personal sta-

¹² Abu al-Ula Mardin, "Development of the Sharia under the Ottoman Empire," Majid Khadduri and Herbert J. Liebesny, *Origin and Development of Islamic Law; Law in the Middle East*, (Clark: The Lawbook Exchange, Ltd., 2008), pp. 279-80.

¹³ Abu al-Ula Mardin, "Development of the Sharia under the Ottoman Empire," pp. 283.

¹⁴ Abu al-Ula Mardin, "Development of the Sharia under the Ottoman Empire," pp. 284.

tus law, which remained unsettled until the enactment of the Ottoman Family Law in 1914.

The *Majalla al-Ahkâm al-'Adliyyah*'s approach employed in inferring the legal rulings can be specified as follows:

1. It is in essence a codification of the Hanafî madhhab, because it was the official *madhhab* of the Ottoman Empire.

2. The Committee of the *Majalla* gave preference to the legal opinions that suited the then current conventions. As an example of this attitude, Article 207 stipulated the permissibility of selling what is nonexistent (whose constituents do not emerge all at the same time but successively, one after another). Such an opinion gives preference to Muhammad ibn al-Hassan, whose view is not dominant in the Hanafî *madhhab*. Ibn al-Hassan's view permitted selling according to *Istihsân* (juristic preference) and on the grounds of making what is existent original and what is nonexistent subordinate to it. Another example is that in which the opinion of Abu Yusuf is adopted in the rulings on *Istisnâ'* (a contract according to which a person buys on the spot something that is to be manufactured, which the seller undertakes to provide after manufacturing the same, using materials of his own according to designated specifications against a determined price) in favor of what is of interest, while Abu Hanîfa's view, which is dominant in the *madhhab*, is abandoned.

3. The *Majalla* limited itself to the introduction that embodied the rules of *Usûl al-Fiqh* (fundamentals of jurisprudence) and of *fiqh*, deeming this introduction sufficient. Thus, the scholars of the *Majalla* did not attempt to lay down a general theory on commitments, a shortcoming that was later supplied in the Tunisian *Majalla Itizâmât*. This Tunisian journal was interested in establishing a general theory on commitments. Such methodological progress in the art of legislative formulation is ascribed by some people to the influence of Santillana David and a number of French scholars.¹⁵

Majalla al-Ahkâm al-'Adliyyah represented a significant event in the history of legislation because of the subsequent codifications and individual attempts at codification through which the journal was taken as a model for the preparation of the law, such as the attempt of Qadri Pasha in his collection of *fiqh* books, through which the dominant Hanafî opinions were set in a receptacle of arranged articles.

During the colonial interregnum in the Muslim world, efforts at the codification of Islamic law had begun and continued during different stages of autonomous period until independence. Then individual efforts, such as those of Muhammad Qadri Pa-

¹⁵ For this article see Muhammad Kamal-ud-Deen Imâm, *On the Methodology of Codification* (trans. by Tal'at Farouq), http://www.islamonline.net/servlet/Satellite?c=Article_C&pagename=Zone-English-Living_Sharī'ah%2FLSELayout&cid=1209357573452 (accessed 4.7.2009).

sha¹⁶ (1306/1889), appeared. He wrote three books on the issue of the codification of Islamic law: *Murshid al-Hayrân* (Guide of the Confused), which consists of 1,045 articles; *al-'Adl Wal Insâf Fi Hal Mushkilât al-Awqâf* (Justice and Equity in Solving the Problems of Endowments), which consists of 343 articles; and *al-Ahkâm al-Shar'iyyah Fi al-Ahwâl al-Shakhsiyyah* (Legal Rulings on Personal Status Law), which consists of 647 articles. This effort was an attempt that relied on the Hanafi madhhab but went beyond the scope of *Majalla al-Ahkâm al-'Adliyyah* in the superiority of formulation and comprehensiveness of topics discussed.¹⁷

The Ottomans adopted some Western codes verbatim between 1850 and 1863 mainly in administrative and commercial law. The trend toward Europeanization stopped short of replacing civil law and personal status law which continued to be within the jurisdiction of *Shar'iyyah* courts. To promote uniformity a solution was sought in the codification of the Islamic law rules. There was much more opposition to this than to outright replacement of Islamic law by European law. This is why Ottoman Civil Code of 1869-1876 was so radical. It codified Hanafi civil law and applied it in all the Islamic courts of Ottoman state. Personal status law was done in the codification of Hanafi law in the Law of Family Rights of 1917. These two pieces of legislation marked a watershed in the development of Islamic law. The remainder of this period saw a continuation of these two developments.¹⁸

In this context we can refer to the attempt at codification by the Libyan judge Muhammad 'Amer in his *Mulakhkhas al-Ahkâm Ash-Shar'iyyah 'Ala al-Mu'tamad Min Madhhab Mâlik* (Outline of Legal Rulings Based on the Authentic Opinions in Ma-

¹⁶ 1769-1849, Pasha of Egypt after 1805. He was a common soldier who rose to leadership through his military skill and political acumen. In 1799 he commanded a Turkish army in an unsuccessful attempt to drive Napoleon from Egypt. As *pasha*, he was virtually independent of his nominal overlord, the Ottoman sultan. He modernized his armed forces and administration, created schools, and began many public works, particularly irrigation projects. The cost of these reforms bore heavily on the peasants and brought them few benefits. In 1811 he exterminated the leaders of the Mamluks, who had ruled Egypt almost uninterruptedly since 1250. With his son, Ibrahim Pasha, Muhammad Ali conducted successful campaigns in Arabia against the Wahhabis. In 1820 he sent armies to conquer Sudan and scored great successes fighting for the Ottoman sultan in Greece until the British, French and Russians combined to defeat his fleet at Navarino in 1827. To gain his intervention in the Greek revolt, the sultan, Mahmud II, promised to make him governor of Syria. When the sultan refused to hand over the province, Muhammad Ali successfully invaded Syria. In 1839 he attacked his overlord in Asia Minor but was forced to desist when he lost the support of France and was threatened by united European opposition. In a compromise arrangement, the Ottoman sultan made the governorship of Egypt hereditary for Muhammad Ali's descendants. He retired from office in 1848. Muhammad Ali is credited for his many domestic reforms, which hastened the foundation of an independent Egypt.

¹⁷ Rushdi al-Sarraj, *Kitâb Majmû'at al-Qawânîn al-Shar'iyya* (Jaffa, 1944).

¹⁸ Christopher Toll and Jakob Skovgaard-Petersen, *Law and the Islamic World Past and Present*, (Copenhagen: Royal Danish Academy, 1995), pp. 16-9.

lik's *Madhhab*) and to the attempt of the Meccan reciter of the Qur'an, Ahmad ibn 'Abdullah ibn Muhammad ibn Bashir Khan in *Majalla al-Ahkâm Ash-Shar'iyyah 'Alâ al-Madhhab al-Hanbalî* (Journal of Legal Rulings According to the Hanbalî Madhhab).

Then, in Egypt, there was Professor 'Abd al-Razzaq al-Sanhuri (1971), who wrote the Egyptian Civil Law, along with other laws for different Arab countries as well. After that, many other Islamic countries started to write juristic laws, most of which were concerned with the Personal Status Law. He prepared the Iraqi Civil Code of 1951 too. The two legal doctrines of neorevivalism and Islamization have become very prominent in modern Islamic law but had a limited place in traditional legal theory. We could see the effects of the Islamization method in the works of reform-minded jurists who made an impact in Islamic world, such as Muhammad 'Abduh, Rashîd Ridhâ, and 'Abd al-Wahhâb al-Khallâf (1956). This is true for some institutions like al-Azhar University in Cairo, the Zaytuna in Fezx, and at universities in Jordan, Syria, Iraq, Kuwait, and Saudi Arabia. The neorevivalist approach to law can be summarized as making constant reference to the primary sources.¹⁹

Some guiding rules should be taken into consideration before endeavoring to codify *fiqh*:

1) This task should be handled by experienced scholars who know what is suitable for societies in the modern world and its problems.

2) The codification should be innovative with respect to the ordering of its chapters, the formation of its articles and the choice of its phrases in a way that appropriately fits and suits the spirit of the time.

3) The necessity of constant revision and development of the articles of the law should be kept in mind.

There are many advantages to codification:

1) It makes it easy to return to the *Sharî'ah*-based rulings and to understand them;

2) It unifies judicial resolutions and lifts some of the burdens that overcome courts and judges;

3) Codification represents, in one way or another, the application of *Sharî'ah*, the preservation of the Muslim heritage and helps to develop the *fiqhî* structure.²⁰

¹⁹ Ravindra S. Khare, *Perspectives on Islamic Law, Justice, and Society*, (Oxford: Rowman&Littlefield Publishers, 1999), pp. 164-68.

²⁰ Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (Leiden: Brill, 2001), p. 136; Yahya Muhammad Owdh al-Khalailah, *Codification Of Islamic Law: Theory And Practice*, Ph.D. thesis, International Islamic University, Islamabad, 2001.

The study of Islamic Law in recent times reminds one immediately of the distinction between the pre- and post-*Tanzîmât* periods of the Ottoman State. The legal regulations in the field of *Sharî'ah* law – perhaps not officially but practically – before the *Tanzîmât* were books of *fiqh* and *fatâwâ*. In fact, *Qâdhîs* used them like laws to such an extent that they even determined according to the interpretations of the *madhhab* concerned the appointments that were to be decided. As a matter of fact, we pointed out earlier that the work called *Multaqâ al-Abhur* by Ibrahim of Aleppo was accepted as the official legal codification of the Ottoman State from the early 17th century onwards, as *al-Hidâyah* was accepted as an official code in Anglo-Muhammadan Law. On the other hand, the majority of the regulations in common law constituted the laws that had been prepared in administrative, financial and penal fields. After *Tanzîmât*, as in every Muslim country, the movement toward legalization started in the Ottoman State in a way similar to that of modern times. The most noteworthy instance of this was *Majalla*, which was the most important *Sharî'ah* law, followed by hundreds of legal arrangements in different fields.

The echoes of the Ottoman *Majalla al-Ahkâm al-'Adliyyah* resulted in legal codifications in non-Muslim countries or legal codes by colonial authorities in some Muslim countries, such as that achieved by the Russian government in 1909 when it enacted a law for the Muslims in Turkistan embodying the personal status law and inheritance rulings. In Algeria as well, in 1898, the French Orientalist Armand-Pierre Caussin de Perceval published a civil Islamic codification in line with the French model of codification and according to the Mâlikî *madhab*, while he took a collection of texts excerpted from al-Khalil's *Mukhtasar* (the abridged edition) and systematically arranged them in articles. He then placed his work at the disposal of a committee formed in 1905 for the sake of codifying the rulings of Islamic *Sharî'ah* that were applied to the Muslim citizens in Algeria.

Surprisingly enough, the work of that committee in the field of codification was restricted to the Sunnî, Hanafî and Mâlikî *fiqh*. It disregarded the 'Ibâdî *fiqh*, which occupied a broad area on the map of Algerian reality. This is surprising and calls for more research to clarify the reasons for this. In addition, in 1907 an Islamic codification was set up for the British courts in West Africa.

However, I do not intend to elaborate on the academic echo of this *Majalla al-Ahkâm al-'Adliyyah*, since its issuance and application in many Arab countries (then subordinate to the Ottoman Empire) set the stagnant pond of Islamic *fiqh* in motion and induced attempts to renew its systems and institutions. This was embodied in judicial reforms and in a scientific movement that revolved around the multiple annotations of *Majalla al-Ahkâm al-'Adliyyah* issued in both Arabic and Turkish. It is sufficient to refer to the annotations by 'Ali Haydar, 'Abdul Sattar al-Quraymi, Ahmad Jawdat Pasha, Khalid al-Atasi, Sulaym Rustum, 'Umar Hilmi and Munir al-Qâdhî.

Moreover, a number of major heralds of the renaissance and scholars of *Shari'ah* and *fiqh* participated in teaching the material of the *Majalla al-Ahkâm al-'Adliyyah* in Iraq, Lebanon, Syria and Turkey, including Imâm Muhammad 'Abduh, who had taught *Majalla al-Ahkâm al-'Adliyyah* at the Beirut School of Law, Muhammad Sa'id al-Mahmasani, teacher at the Damascus Institute of Law, 'Ali Haydar, teacher at the School of Law in Constantinople, and 'Abd al-Razzaq al-Sanhuri, teacher at the Iraqi Faculty of Law at the beginning of the 1930s.

This movement had a noticeable impact on directing the political decision toward adopting the application of Islamic *Shari'ah* and also on drawing an integrated map for a judicial renaissance that included establishing institutions, writing theses and working out curricula for comparative studies. It also had an impact on introducing the Islamic *Shari'ah* at conferences on comparative law and on acknowledging it as a judicial system among contemporary judicial families. Moreover, with regards to efficiency, it was ahead of the Latin and Anglo-Saxon collections.

In recent decades, however, the movement of Islamic codification has become active, especially after the voices of those calling for legislative independence and for attempts to apply Islamic *Shari'ah* were raised. This codification has become embodied in constitutional texts in several Arab and Islamic countries.²¹

7.3 The Method of Codification in Islamic Law

The term codification, within its historical meaning, is the reduction to writing of a law previously only extant in oral form. In this sense the concept of codification does not differ substantially from legislation. In time, however, the concept of codification came to acquire a different meaning; namely, that whereas legislation serves to lay down a specific normative instruction – with the object either of innovating a legal norm where none had previously existed or of varying and amending an already existing legal norm, codification is concerned with circumscribing a whole legal system, or at least a branch of it.²² We should make distinction between two kinds of codifications: classical codification and modern codification. Codification of the 19th century was a unique socio-historical phenomenon that emerged with the impulse of the French Revolution and the rise of philosophical doctrines such as, iusnaturalism, rationalism and the Enlightenment. However, by the turn of the 19th century, the “clas-

²¹ Cf. Mohammad Abdul Aleem Siddiqui, *The History of The Codification of Islamic Law: Being An Illuminating Exposition of the Conformist View-Point Accepted by the Overwhelming Majority of the Islamic World*, (Anjuman sunnat-wal-jama'at, 1950), pp. 5ff.

²² Cf. Courtenay Ilbert, *Legislative Methods and Forms*, (Clark: The Lawbook Exchange, Ltd., 2008), pp. 122ff; Maria Luisa Murillo, “The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification,” *J. Transnational Law & Policy* [Vol. 11:1 Fall, 2001], pp. 1ff.

sical" Codification had been subjected to new forces that gradually changed the legal and social order with crucial consequences on the civil law tradition.²³

We don't agree that the *Sharī'ah* is a jurists' law only.²⁴ We have explained above that every *fiqh* book like *al-Jâmi' al-Saghîr* is a codification of rules. For example, if you numerate the sentences of *Multaqâ al-Abhur* as the articles of a legal code, you could reach a codified law like *Majalla*. For this reason, Ottoman state has declared *Multaqâ al-Abhur* as Ottoman civil code (*firman* dated 1648 and 1687).²⁵

The fundamental question is this: Which method was pursued in the preparation of the aforesaid Islamic regulations?²⁶ As is well known, a legislator can choose between two major methods when preparing a law.

7.3.1 The Casuistic Method

A particular legal rule is expressed in the form of a factual case and not by a simple statement of the legal principle without embodiment in a concrete example. Thus, for instance, the normative principle that a person – even when acting in his own domain – must guard against causing harm to his neighbor, is expressed by way of a long series of practical instances of prohibitions or injunctions: that a man must not dig a pit near his neighbor's property, or that he must remove his salt or lime from his neighbor's wall, etc. This method, which requires that all matters should be arranged only by law, the best example of which is the "*Public Laws of Prussian States*," dated 1794, consisting of over 17,000 Articles.²⁷ The laws in the *Mishnah*²⁸ are mostly formulated in a casuistic too. Casuistry in Christian theory is a term in applied ethics term referring to case-based reasoning. It is used in juridical and ethical discussions on law and ethics, and is often a critique of principle or rule-based reasoning. Critics use the term pejoratively for the use of clever but unsound reasoning, especially in relation to moral questions (cf. sophistry). Casuistry is reasoning used to resolve moral problems

²³ Maria Luisa Murillo, "The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification," *J. Transnational Law & Policy* [Vol. 11:1 Fall, 2001], pp. 1-2.

²⁴ Cf. Rudolph Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a is codified," *Mediterranean Politics*, Volume 7, Issue 3 Autumn 2002, pages 82 - 95.

²⁵ Akgündüz, Ahmet, *Osmanlı Qanunnameleri ve Hukukî Tahlilleri*, (Istanbul: OSAV, 2006), vol. I, p. 270.

²⁶ Ashk Dahlén, *Islamic law, Epistemology and Modernity: Legal Philosophy in Contemporary Iran* (New York: Routledge, 2003), pp. 38-48.

²⁷ Zâhit İmre, *Medenî Hukuka Giriş* (Introduction to Civil Law) (Istanbul: Filiz Kitâbevi, 1976), pp. 70-71; Akgündüz, *Kulliyât*, p. 366.

²⁸ The Mishnah or Mishna is the first major written redaction of the Jewish oral traditions called the "Oral Torah" and the first major work of Rabbinic Judaism.

by applying theoretical rules to particular instances.²⁹

According to some scholars, irrespective of the particular theoretical inclination favored, there is no doubt that multiple norms will be generated in any interpretive undertaking, a fact that is amply observed by the term *ta'addud al-ahkâm* in traditional Islamic literature. The basis of this contention can be traced, with some effort, back to Islamic legal history and literature. After the post-recognition phase of *madhabs* (the schools of Islamic Law), Muslim jurists found it increasingly hard to espouse the concept of *Ijtihâd* "proper" through the medium of *iftâ*, thereby limiting the response of an independent jurist to the ambit of his own juridical school. At times some of these jurists resorted to quasi-artificial casuistic methods to achieve equity between presumed universality of complete legal paradigm, i.e. *Sharî'ah*, and its practical manifestation with respect to the application of law to facilitate the functions of a society. Most of these casuistic developments - for instance *Istihsân* (juristic preference), *istishâb* (presumption of continuity), *'urf* (custom) - in medieval times were arguably instigated by the desire to achieve a rational character for the law, thereby circumventing an almost subjective and probably mistakenly understood and emphasized universality of norms. And if all these developments and the enormous literary genre that evolved from them achieved a kind of "practical wisdom" in line with social reality of times, it seemed rationally inconsistent to a modern critical mind.³⁰

It has been alleged that the methods of earlier laws, especially of *Majalla*, were casuistic,³¹ a view that may not find complete agreement. As far as we can gather, the Islamic system of legislation does not fully resemble either method. The method followed by *Majalla* is the method of books of Islamic jurisprudence (particularly texts of Islamic jurisprudence). Both texts of Islamic jurisprudence (for instance, *Gurar* by Molla Khusraw) and *Majalla* followed a mixed method that we could call abstract - casuistic. The quality of being abstract outweighs the other. Those that call the method of *Majalla* "casuistic" cite as a reason that a civil code must not be made up of 1851 Articles. More than 400 articles of the *Majalla* concern procedural law while 250-plus articles concern commercial law. If 200 Articles are subtracted for goods and loans, more than 1100 articles remain. On the other hand, the number of the articles in our Law of Loans and Civil Code related to the two above-mentioned branches of law is more than 900. We hold that the difference of 200 articles does not require a difference in method. In short, if the regulations are studied closely, it can easily be seen that an abstract - casuistic method was followed in the former regulation. Nonethe-

²⁹ Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases, & Materials*, (New York: SUNY Press, 1975), pp. 31-33.

³⁰ Imran Ahsan Khan Nyazee, *Islamic Jurisprudence: Usûl al-Fiqh*, (January 2005).

³¹ Imre, *Medenî Hukuka Giriş*, p. 94, and the majority of contemporary jurists.

less, it may not be alleged that the former regulations were written like current modern laws are written.³²

We should add that much academic research on Islamic law has been carried out under the shadow of Max Weber's elusive notion of "rationality", that uniquely Western propensity for being detached, formal, logical, legal, bureaucratic, capitalistic, scientific and secular, which takes its history as the norm for universal sociology. Needless to say, from the Weberian perspective, modern, secular law appears to be the supreme embodiment of this salubrious rationality that is presumed to be lacking in other legal traditions. Islamic *fiqh*, which regards divine revelation as its source and derives its norms from it, is, accordingly, adduced as a paradigm of sacred law that is not amenable to rational legal calculus and mundane logic. Even the practice of Islamic law is deemed to be symptomatic of *Qâdhî* justice (casuistic), the erratic and subjective form of adjudication on the basis of extralegal - ethical, religious, political, sentimental and utilitarian - considerations, which is the reverse of the legal formalism and substantive rationality of the West. Islamic Law, being unstructured and transcendent, sustained more by faith and intuition, and driven by culture and mores than by formality and procedure, is thus the complete antithesis of Western law.³³

Although Weber himself may not have been responsible for the derisive term *casuistic* and may not have regarded it as paradigmatic for the Islamic tradition, its hold on the Western imagination is certainly due to his standing as the ideologue of modernity and rationality. Little wonder that it became part of the cultural consciousness of the West and gave its legal practitioners some cause for self-acclaim. Lord Justice Goddard of the English Court of Appeals, for instance, complained that "the court is really put very much in the position of the *Qâdhî* under the palm tree. There are no principles on which he is directed to act. He has to do the best in the circumstances, having no rules to guide him." Justice Felix Frankfurter, for his part, remarked that the Supreme Court of the United States is not a tribunal unbounded by rules: We do not sit under a tree like a *Qâdhî* dispensing justice according to considerations of individual expediency.³⁴

Some non-Muslim scholars have claimed that Islamic law is a typical jurist' law and argued that no political authority ever discussed the issue of its constitution and no such authority decided anything about its creation or inauguration; it developed

³² Akgündüz, *Külliyât*, pp. 366-67.

³³ Cf. Rudolph Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a is codified," *Mediterranean Politics*, Volume 7, Issue 3 Autumn 2002, pages 82 - 95.

³⁴ S. Parvez Manzoor, "Legal Rationality vs. Arbitrary Judgement: Re-Examining the Tradition of Islamic Law," printed In *Muslim World Book Review* (Leicester: Islamic Foundation, 2003), vol. 21, no: 1, pp. 3-12.

solely through the work of individual experts. I think these scholars are not aware of *usûl al-fiqh* and the process of improvement and codification of Islamic law.³⁵

7.3.2 *The Abstract (Normative) Method in Law*

The second method is the *abstract* one, which stipulates general rules according to the nature of affairs during the preparation process of laws. Islamic law has a kind of “formal jurisprudence,” employing all the tools of discursive logic yet envisaging the use of universal principles and clearly pronounced norms. This is a direct method for obtaining the differential conservation laws in the field theory from which the principle of stationary action is proposed. The method is based on a variation of field functions through a small local transformation of a special kind. The abstract method advocates general principles and rules that should be implemented. We could use the term of normative too. In law, as an academic discipline, the term “normative” is used to describe the way something ought to be done according to a value position.

We can compare this method with moral absolutism, which is the meta-ethical view that certain actions are absolutely right or wrong, regardless of the context of the act. The word absolute is a very interesting term that is quite often used unreflectively. Thus lying, for instance, might be considered to be always immoral even if it is done to promote some other good (e.g., saving a life). Moral absolutism stands in contrast to categories of ethical theories like consequentialism and situational ethics, which hold that the morality of an act depends on the consequences or the context of the act. Ethical theories that place strong emphasis on rights, such as the deontological ethics of Immanuel Kant, are often forms of moral absolutism, as are many religious moral codes, particularly those of the Abrahamic religions.³⁶

The term abstract method is used in many disciplines, ranging from physics to philosophy. In this context we can define the abstract method as follows: in object-oriented programming, the term method refers to a subroutine that is exclusively associated either with a class (called class methods, static methods or factory methods) or with an object (called instance methods). Like a procedure in procedural programming languages, a method usually consists of a sequence of statements to perform an action, a set of input parameters to customize those actions and possibly an output value (called return value) of some kind. The purpose of methods is to provide a mechanism for accessing (for both reading and writing) the private data stored in an object or a class.

I think the term “abstract method” is to be preferred. Most of the modern read-

³⁵ Haim Gerber, *Islamic Law and Culture, 1600-1840*. (Leiden: Brill, 1999), pp. 23-4.

³⁶ Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000), p. 192.

ings of Islamic law generally fail to acknowledge these subtle distinctions but so does the modern jurist who remains caught, on the one hand, between the pursuit of both the legal and ethical applications of law in society on the one hand and the quest to achieve a formalized rationality of jurisprudential method on the other.³⁷

We believe that Islamic Law has a mixed method. It has some features of the casuistic method because we cannot deny that Islamic Law is partly case law (*mas'alah*). But Islamic law also has some features of the abstract method because it has general legal principles that should be implemented. Based on theological and rational arguments, the juridical authority of what *mujtahids* called holistic evidence (*al-dalil al-kullî*) is considered one of the fundamentals (*usûl*) to which *mujtahids* had given priority over single and partial rulings. If one investigates the articles of *Majalla*, these features can be observed together. If one looks at the code of Khalil from the Mâlikî School or the code of *Multaqâ al-Abhur* from the Hanafî school, one realizes that two types of rules, the very specific and the very general, exist side by side. It would be very surprising indeed if one were to find a code that could be described as "concrete." Such a code would be absolute upon its very completion. The very fact that *Mukhtasar* or *Multaqâ* survived hundreds of years in locations as different as Andalusia, Africa, Egypt and the Ottoman State, indicates that they must have had sufficient generality to allow it to withstand changes in both time and place. For example, one cannot accurately describe the concrete rules in *Mukhtasar* as actual rules; instead, *Mukhtasar* may cite concrete examples as instances of a general rule, especially if that example's inclusion within the general rule has been controversial, or if that case is likely to recur before a judge or *muftî*. A clear example of this is in the chapter of sale, where *Mukhtasar* says: "The sold item must be pure, unlike dung and unlike oil which has been polluted."³⁸

Finally, we should explain that we do not agree with Weber's classification of the Islamic legal system as substantially irrational because it far from reflects the realities of Islamic legal practices, at least the ones on which we have data. In fact, the data based on actual court records reveal that the proceedings in the courts were quite different from what Weber described as "*qâdhî* justice."³⁹

³⁷ Geoffrey Samuel, *Epistemology and Method in Law* (Farnham: Ashgate Publishing, Ltd., 2003), pp. 252-55; Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases, and Materials* (Albany: SUNY Press, 1975), pp. 31-33.

³⁸ Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*, pp. 46-47; Robert Gleave and Eugenia Kermeli, *Islamic Law: Theory and Practice* (New York: I.B.Tauris, 2001), p. 74.

³⁹ Gleave and Kermeli, *Islamic Law*, p. 74.

7.3.3 *Special Aspects of the Codification of Islamic Law*

With respect to the preparation of Islamic laws codification followed two directions.⁴⁰

The first was that taken by *Majalla al-Ahkâm al-'Adliyyah*, Qadri Pasha's attempts, and the Islamic legislations done by the Hanafî madhhab in Pakistan, as well as the Islamic Research Academy in Egypt with respect to its attempt to classify the *fiqh* of the Four *Imâms* within a methodological framework. This direction formulates the *fiqh* of a certain *madhhab* or adopts that *fiqh* as a basis for preparing such codification, taking other *fiqhî* approaches into account when necessary. The approach has the disadvantage, however, that codification is thus confined to a denominational framework that fails to include the movement of reality, thereby causing restriction in the formulation.

The *second* is to formulate the Islamic *fiqh* as a whole and viewing it as such, thus ignoring denomination differences.. This approach adopts selections and *Ijtihâd* opinions or aims at formulating new opinions when necessary, without limiting oneself to a certain *madhhab*. This approach is viewed as realistic because it transcends sectarian bigotry, removes restriction in case of narrowness of the (assumed) *madhhab*, and gives legitimacy to the *fiqh* of Islamic *madhhabs*. The positive side of this approach is that it embraces the multiplicity of *fiqhî madhhabs*, thus confirming the importance of the different branches of with a single Sharî'ah. It displays openness to other *madhhabs*, wanting to understand them, assimilate their sources and study their texts.

The scientific aspect and its development and the practical aspect and its development are perhaps the most important.

Scientific Aspect. After two centuries the *fiqhî* mentality adopted an approach the acceptable in almost all scientific circles. It uses the following methodological bases:

1) It views *fiqh* an integrated whole, making selections from all the *madhhabs*, preferring ones through rules that depend only on more than the preponderance of evidence.

2) It ratifies *talfiq* (synthesis) in legislation, i.e a ruler makes a selection of rulings from the different admissible *madhhabs*, with the result that these rulings constitute a law acknowledged by the subjects of that ruler. Therefore *talfiq* should observe the following rules:

⁴⁰ What follows is based on Muhammad Kamal-ud-Deen Imâm, "On the Methodology of Codification," (trans. by Tal'at Farouq), http://www.islamonline.net/servlet/Satellite?c=Article_C&page-name=Zone-English-Living_Shar'ah%2FLSELayout&cid=1209357573452 (accessed 4.7.2009). This is a paper presented to a seminar on "The Codification and Renewal of Contemporary Islamic Fiqh," held in Muscat, Oman, 5-8 April 2008.

- a) select the weightiest opinion and deviate from it only in case of necessity;
- b) view *al-Maslahah al-Mursalah* as an element of weight concerning legislative selection;
- c) adhere to the principles of facilitation and removal of restriction in legislative selection. This is necessary, with respect to method, since these principles are among the principles and objectives of *Sharī'ah*.

Substantively, *talfiq* depends on the fact that obedience to the ruler is obligatory as long as it does not prohibit a permissible act nor command what is prohibited and it has the welfare of the *Ummah* in view. Procedurally, *talfiq* depends on the authority of the ruler with respect to designating judicature. A ruler can preclude some cases being heard except through a special regulation: complete preclusion would imply juristically and judicially impermissible confiscation of the right to litigation.⁴¹

Here attention should be drawn to the phenomenon of gradation in applying codification, i.e. applying codification in some fields before others. This is acceptable, since it would avoid encumbering the ruler and society through the immediate application of laws, thus closing the door to adversaries of *Sharī'ah*. But, as a transitory application, gradation should not go contrary to an integrated codification because *Sharī'ah* is an indissoluble whole. Gradation is thus nothing else than paving the way for the *Ummah* for its return to its original law. All the circles of *Sharī'ah* are related to an integrated way of life that guarantees soul and body, individual and society. Worldly interests are preserved by this way of life and it also has a positive effect in the hereafter.

There has been a great deal of controversy in the authorized committees regarding approaches to the codification of Islamic *Sharī'ah*.

Three approaches should be mentioned here:

1) The first approach is limited to reviewing the established texts by retaining only what is consonant with *Sharī'ah* and correcting what contradicts it.

2) The second approach, taken up at the end of the 19th century in some Islamic countries looks at the entire established legal system that has been derived from the Roman, Anglo-Saxon, and Germanic laws and turns it upside down.

3) The third approach was used by the committees formed in Egypt after the Permanent Constitution of 1971 was enacted. This constitution stated that *Sharī'ah* was the main source of legislation. Here *Sharī'ah* is viewed as the main source of legislation, thereby dismissing any positive law that contradicts it.

⁴¹ Cf. Ralph H. Salmi, Cesar Adib Majul and George Kilpatrick Tanham, *Islam and Conflict Resolution: Theories and Practices*, (University Press of America, 1998), pp. 107-8.

This third approach also entails a review of all the laws, to bring everything into accordance with the principles of *Sharī'ah*, preserving what conforms to them, and introducing new rulings that agree with them. Thus, laws that do not contradict *Sharī'ah* may be preserved and be linked to Shar'ī principles and *fiqhi* rules, severing their relationship from the laws from which they were derived and thus making the codification an integrated whole.

On the other hand, Egyptian legislation set draft laws that have not yet been enacted, because of the following principles:

1) The codification should be linked to its *Shar'ī* sources in the Noble Qur'an, the *Sunnah* of the Prophet, *Ijmā'* (consensus), or any juristic opinions recorded in the books of Islamic *fiqh*. If there are differences regarding interpretation or application, the judge or jurist can then refer to those sources and their Islamic referential authority rather than foreign laws.

2) Adherence to a certain *fiqhī madhhab* is to be avoided, even if it is the Hanafī *madhhab* so that the narrowness of a single *madhhab* will be transcended to include the whole of Islamic Sharī'ah with its different *madhhabs*. The Islamic *madhhabs* are nothing more than the result of individual viewpoints that are binding for others only when corroborated by proof of their validity and of the validity of their legal benefits.

3) The material that deals with unprecedented affairs that have no *Shar'ī* origins (but do not contradict the origins of Sharī'ah) should be established on the basis of the rule of *al-Masālih al-Mursalah* (i.e. the public welfare connected this is neither enjoined nor prohibited in any Islamic source, as a source of Islamic *Sharī'ah*.).

4) The investigation of minor details or the stipulation of their rulings should be avoided. The obligation of flexibility is fulfilled through settling for generalities and *fiqh* and the judicature can thus fulfill their roles of employing generalities and applying them to occurrences, in accordance with the established rules of Islamic *fiqh*.

7.4 Some Perceptions of Islamic Law

Many modern scholars have accepted the views of Joseph Schacht, who argued that the idea of the *Sunnah* and the theory of the sources of Islamic Law did not really develop until the 9th century and that Islamic Law is not really derived from the Qur'an and the *Sunnah*. Many Western scholars have agreed with him without academic proofs. Rather, according to this view, it evolved gradually from a variety of sources (such as earlier legal systems and decisions made by early Arab rulers), and the classical Muslim theory of the sources of Islamic Law was developed by the early Muslim scholars (culminating in the work of al-Shāfi'ī) in order to give the positive law that had evolved in the first centuries of Islam a proper Islamic basis. These scholars,

it is argued, looked at the law as it existed in their own day, reformed, rejected or accepted it and then sought to portray it as derived from the Qur'an, the *Sunnah* or one of the other classical sources. Since there was a limit to what could be attributed to the Qur'an (which is relatively short and only partly concerned with establishing legal rules on a few questions), it was the *Sunnah* (as reported in the *hadiths*) that was, in practice, most important. Since there was virtually no limit to the way in which *hadiths* could be interpreted or reworded and new ones put into circulation, it was usually easier to find a *hadith* to support a particular legal rule than it was to find a Qur'anic text.⁴²

Most Western scholars do generally view Islam with respect to law in the biased and exaggerated reporting on *jihad* (here the word is equated with "terrorism"), the subjugation of women (the reality is more complex), "Islamic penalties" (seen simplistically as physical mutilation), and *fatwâ* (equated, with gross inaccuracy, with the death sentence). These are crude and obvious examples. They are primitive constructions of the "other," the East. At the same time, however, the temptation to construct remains and there are quite sophisticated forms in circulation today. According to them there are many hurdles to compatibility of *Shari'ah* and Human Rights. They have based their views either on non-existing examples like honor killings, or misunderstandings like the claim about "no limits in Islamic law about implementation of punishments" or extremist examples from Muslim world like fatwa of Khumaini about Salman Rushdi. In recent years this point of view has started to change. They have accepted that Islamic law recognizes the legal power of state authorities (*siyâsah*) to enact legislation for the regulation of the society. As we will explain in constitutional law, many fields of public and private law have been left to *ulu al-amr* (statesmen and authorities).⁴³

Unfortunately, we cannot devote time and space to an evaluation of these opinions. Some Muslim scholars have already criticized them.⁴⁴

⁴² J. Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon, 1986), pp. 1-5, 199-211; Haim Gerber, *Islamic Law and Culture, 1600-1840*, (Leiden: Brill, 1999), pp. 23-24.

⁴³ M.B. Hooker, "Introduction: Islamic Law in South-east Asia," *Asian Law*, vol. 4, No: 3 (Australia: The Federation Press, 2002), pp. 225-30; cf. Jan Michiel Otto, *Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy*, (Amsterdam University Press, 2008), pp. 27ff.

⁴⁴ Cf. for instance, Muhammad M. al-A'zami, *On Schacht's Origins of Muhammadan jurisprudence*, (Riyadh: King Saud University, 1985).

8 THE IMPLEMENTATION OF ISLAMIC LAW AND ITS FUTURE

8.1 The Implementation of Islamic Law

There are many contemporary debates on the implementation of the *Shari'ah*. These debates are a rich source of insight into the diverse understandings and uses of the Islamic legal tradition in the modern world. Some Muslim communities are engaged in vibrant and far-reaching debates on the terms, relevance, and developmental limits of Islamic law.¹

In Islamic law, *ihqâq-i haq* is forbidden completely. That means a Muslim individual cannot implement any punishment in Islamic Penal Law by his own power. Anyone who did so must be punished according to Islamic Law. Punishments in Islamic Law can be carried out only by a Muslim State through the decision of a court. Even more, Muslims must live as citizens or migrants in Western states in peace and harmony only according to the rules of the "land of peace" (*Dâr al-Amân*). To teach these religious rules to Muslims living outside the Islamic world - in the hope of avoiding the violation local regulations and respect local laws - is a crucial point in the direction of the real integration and peaceful and harmonious life. As Muslim individuals, our responsibility is indicated by two phrases: *mâ'nawî jihâd*, that is, "jihâd of the word" or "non-physical jihâd," and "positive action." We should insist on these words to avoid any use of force and disruptive action. Through "positive action" and the maintenance of public order and security, the damage caused by radical forces could be "repaired" by the healing truths of the Qur'an.²

In the past, the Muslim states applied *Shari'ah* or Islamic Law to all areas of Muslims' lives: public, private and international relations. With colonization, Western countries imported their secular legal systems (common law or civil law) into Islamic countries. Even after independence, Islamic countries continued to practice the legal systems of their colonial masters. There are different historical, cultural, social, political and economic differences that clearly influence the implementation of Islamic law among Islamic countries. As we mentioned about classification of Islamic rules, there are certain fundamental precepts of Islamic law, founded on clear and unambiguous

¹ R. Michael Feener and Mark E. Cammack, *Islamic Law in Contemporary Indonesia: Ideas and Institutions*, (Cambridge: Harvard University Press, 2007), p. 9.

² Sukran Vahide, "Bediuzzaman Said Nursi's Approach to Religious Renewal and its Impact on Aspects of Contemporary Turkish Society," in *Contemporary Islamic Thought*, edit. By Ibrahim M. Abu-Rabi', (Blackwell Publishing Ltd, 2006), pp.55-7.

Qur'anic injunctions and generally accepted by most Islamic countries.³

We should now explain some principles concerning the implementation of Islamic Law generally. Many Western people fear that Muslims may enforce Islamic law in the future in their countries or think that Muslim individuals may implement some rules of Islamic law themselves. This is not a correct assumption.

We should narrate some Islamic rules relating to this issue.

1. We could say that only sovereign Muslim states/governments have legal authority to implement Islamic Law, and individual Muslims have no legal authority or power to implement Islamic Law. Surely Islamic Law does not state that every Muslim is obliged to implement Islamic Law. It does not matter how efficient and popular that individual may be as a brave warrior or a meticulous planner of unlawful and immoral schemes of hatred, terror and destruction. Only those who are properly qualified and trained and have been licensed by Muslim governmental authorities have the authority to issue *fatwās*. Not every Muslim individual qualifies as a *muftī* (a juristic consultant or legal scholar who has been given a license to issue *fatwās*). For this reason Bediuzzaman says: "And we know that the fundamental aims of the Qur'an and its essential elements are fourfold: divine unity (*al-tawhīd*), prophethood (*al-nubuwwah*), the resurrection of the dead (*al-hashr*), and justice (*al-'adālah*)."⁴ *Al-'Adālah* means law. He adds in another treatise: "Let our *ulul-amr* (official authorities) think over implementing these rules."

With respect to the means for removing the *munkar* (evil), and not remaining silent when faced with it, *Sharī'ah* has demonstrated that in the *hadīths* that Muslims told about Abu Saïd al-Khudari, where the Prophet said; "Whoever of you has seen a *munkar* let him change it with his hand, if he cannot then by his tongue, and if he cannot then by his heart and this is the weakest *īmān*." Another version says that "after that there is not an atom of *īmān*."⁵

This means that if the *munkar* is not denied in the heart then there is no atom of *īmān* in the heart of that Muslim. So if the Muslim is able to remove the *munkar* by his hand, then he is obligated to remove it by himself. If he cannot do that but can deny it

³ Abdul Ghafur Hamid and Khin Maung Sein, "Reservations to CEDAW and the Implementation Of Islamic Family Law: Issues And Challenges," *Asian Journal of International Law* 1 (2006): 121-55; for more information see: Maurits Berger, "Sharī'ah Law in Canada- Also Possible in the Netherlands?" in Paulien van der Grinten, Ton Heukels, F. J. A. van der Velden, *Crossing Borders: Essays in European and Private International Law, Nationality Law and Islamic Law*, (Amsterdam: Kluwer Rechtswetenschappelijk Publicaties, 2006), pp. 173-83..

⁴ Bediuzzaman Said Nursi, Introduction, *Signs of Miraculousness: The Inimitability of the Qur'an's Conciseness* (Istanbul: Sozler Publications, 2007), p. 18.

⁵ Abu al-Husayn Muslim ibn al-Hajjaj Al-Naysaburi, *al-Jāmi' al-Sahīh*, (Cairo: Dār Ihyā al-Turāth al-Islamī, 1954).

openly and attack it verbally in public, then he must do that. If he cannot do that, then he is obligated to deny the *munkar* in his heart, and he can do this by saying to himself, for example, "O my Lord, this is truly a *munkar* that doesn't please you."

We will explain in the chapter on Islamic Administrative Law (in the book on Public Law) that the implementation of Islamic Law belongs to the tasks of the caliph or the Muslim state. We can summarize some tasks of a caliph. They are: 1) to protect religion; 2) to apply Islamic rules; 3) to implement Islamic penal law, especially *hudûd*.⁶

2. Islamic international law has paid primary attention to the state's jurisdiction in prescribing law in criminal matters. There are numerous theories of jurisdiction to be prescribed.

The *territorial theory* allows for jurisdiction over persons, things or acts that take place within the territorial boundaries of the state. Under the nationality theory, a state may prescribe law over persons or things that share its nationality. Moreover, customary international law, under the nationality theory, permits a state to exercise jurisdiction over its subjects wherever they may be located. The protective principle expands these traditional bases of jurisdiction by emphasizing the effect of an offense committed outside the territory of a state and allows the exercise of jurisdiction where conduct is deemed harmful to the national interests of the forum state. Most European countries have accepted this approach, including Austria, Denmark, Finland, France, Spain, Sweden and Greece. Thus, any state may impose liability, even among non-citizens, for conduct outside its borders that affects and has consequences that the state reprehends within its borders. We can summarize by saying that the territorial principle allows for the exercise of jurisdiction over acts occurring within a state's territory. Sunnîs and specially Hanafîs have preferred this principle.

The second theory is the *extraterritorial jurisdiction* theory that allows for the exercise of jurisdiction over acts occurring within and outside of a state's territory. The Shi'ite schools of law prefer extraterritorial theory. It means that it allows for Islamic Law on apostates to be applied in non-Muslim countries. The majority of "Sunnîs do not believe in extraterritorial jurisdiction." So Muslims who live in a non-Muslim country are not morally responsible to their native Muslim state for acts of fornication, apostasy, etc.

3. The most important thing we have looked at is the relationships between Muslims and non-Muslims in non-Muslim countries. An issue that we must look at now is that of the abode: the *dâr*. Although there may be some people who are educated in

⁶ Abu al-Hasan Ali ibn Muhammad al-Mawardi, *al-Ahkâm al-Sultaniyyah fi al-Wilayat al-Diniyyah* (Kuwait City: Dar ibn Qutaybah, 1989), pp. 22-23; Zafir al-Qasimi, *Nizâm al-Hukm fi al-Shari'ah wa al-Târikh al-Islamî* (Beirut: Dar al-Nafa'is, 1990), pp. 352-53.

Islam who are aware of this issue of the abode, there are many who are not. In fact, even some *fuqahâ*, scholars in Islamic law and the legal system, can be found who are unfamiliar with this issue. The issue is this: most people believe that Muslims think that the world is divided into two abodes, the abode of peace and the abode of war. The abode of peace is the country of the Muslims, *dâr al-Islam*, and the abode of war (*dâr al-kufr*) is everywhere else. This is held to be one of the most fundamental problems with the Muslims: viewing the world as a dichotomy of these two abodes. Thus, the central aspect of international relationships with the Muslims is aggression, one of war. This view is wrong. There are three abodes: the abode of peace, the abode of war and the abode of treaty (*dâr al-'ahd*) where there is a contractual agreement between the other two abodes.

For instance, when I came to the Netherlands, I was issued a visa, and I signed a document. In the issuance of the visa and my signing of it a legally binding contract occurred, a *sulh*. It was an agreement that when I came into this country, I would obey its laws and follow the restrictions that this visa demanded I follow. This was a contractual agreement that is legally binding even according to divine law. Thus, we have to understand that the relationship between the Muslims living in this country and the dominant authorities here is a relationship of peace and the contractual agreement of a treaty. This is a relationship of dialogue and a relationship of give and take.⁷

4. The interpretation and application of even a religious directive pertaining to the state affairs, it is consultation (*shûrâ*) that should be the procedure (*majlis al-shûrâ*)⁸. Experts of Islamic sciences may proffer their opinions. It is their right to express their viewpoints, but their opinions become legally binding on people only when the majority of the elected representatives of people (*majlis al-shûrâ*) accept them. It is the right of the people to disagree with decisions of the *majlis al-shûrâ* and to express their viewpoints to rectify its mistakes. However, no one as an individual has the right to violate the laws enacted by the *majlis al-shûrâ* or to defy the system. Neither the *'ulamâ* nor the judiciary is superior to the *majlis al-shûrâ*. Each institution has the obligation to comply with the *shûrâ* decisions even if it has differences of opinion with

⁷ Abdulkarim Zaidan, *Ahkâm al-Dhimmiyyin wal Musta'manin*, (Baghdad: 1963), pp. 20-21; Ahmad Al-Sarakhsi, *Sharh al-Siyar al-Kabir*, I-IV, (Cairo: Ma'had al-Makhtutat, 1971), vol. 4, pp. 302-20.

⁸ *Majlis al-Shûrâ* is a transliteration of the Arabic which means approximately "consultative council". The noun *shura* alone means "consultation" and refers to (among other things) a topic in Islamic law. The expression *Shûrâ Council* as a partial translation of "*Majlis al-Shûrâ*" is the conventional English rendering of the name of the upper house of the Egyptian parliament. We will explain the legal authority and functions of this *Majlis* in Public Law.

it.⁹

We will explain this in detail in book three (on Public Law).

8.2 The Future of Islamic Law

8.2.1 *The Future of Islamic Law in Muslim Countries*

The place of Islamic law in the modern world is part and parcel of the fate of the religion that gave birth to and nourished the law. It appears that the outcome of the debate on the future of Islamic law would, to a great extent, depend upon finding the right answer to difficulties in the Muslim world. The proper context for the study of the relationship between the theory and practice of Islamic law is social history. The Ottoman State is a good example for this.

We could say that the nature of Islamic Law is such that it can operate as an organic law, even when the large tree of the organization collapses and fails to function. History relates that this is what happened when the Mongols ravaged Baghdad and the Turkish defenders of the empire were not able to continue their role as the guardians and custodians of Islam. This is due to the nature of Islamic Law, which is not a law in the Western sense of the word. *Fiqh* is a “praxis understanding” that provides an internal view into how one is to act and live as a Muslim. It is obvious that the future of the Islamic law cannot be separated from the economic, political and social future of the countries in which it is applied. The course of legal development in Muslim countries in the last two hundred years shows that Islamic law is alive and doing well in the modern world, and enhancement of its integration in modern state structures.¹⁰

The background of the Western invaders in the period 1750-2004 was different from that of the Mongols. They came with the ideals of democracy, pluralism, tolerance, human rights and secularism, which were not simply beautiful but were dictated by the need of the modern state. However, these modern states required colonization to expand, and that meant the colonization of agrarian societies into ones producing raw materials and exporting their goods. The ideals of democracy, tolerance and human rights were valid within the state but seemed to be totally void concepts when Western states had to subject their colonized countries. Undoubtedly, this led to mas-

⁹ Cf. Abû al-A'lâ Mawdûdî, *Tafhîm al-Qur'ân*, vol. 4, (Lahore: Maktabah-i ta'mîr-i insâniyyat, 1972), pp. 509-10.

¹⁰ Anita M. Weiss, *Islamic Reassertion in Pakistan: the Application of Islamic Laws in a Modern State*, (Syracuse: Syracuse University Press, 1986), p. 107; Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence*, (Leiden: Brill, 2001), pp. 188-89.

sive cultural problems in societies where industrialization was being developed.¹¹

With respect to learning Islamic Law in the Western world, the current state of affairs is rather interesting. One ought to realize that the Islamic legal tradition, however, is neither monolithic nor static. It is a dynamic tradition that rises to new challenges but refuses to abandon its core characteristics. In what might be called the "Islamic Renaissance," numerous Islamic legal approaches have emerged, each claiming authenticity and superiority over the others.¹²

We should accept that Islamic law referred to basic principles or to verses in the holy texts, or used inductive and deductive methods developed in debates between jurists and schools of law. The method of its production changed: law was no longer produced in jurist debates and writings but enacted by a political legislator, the state. The hierarchy of norms changed. The legal norms were recognized not because they referred in the last instance to the Qur'an and the *Sunnah* or to recognized methods of norm justification, but because they were promulgated by the political legislator.

When the end of the colonial period approached, the creation of a national law was high on the agenda of most Arab states, as it was in Pakistan. But in the Arab world few people thought of reintroducing Islamic law as the dominant law. Even fewer thought it would be useful to reproduce Islamic law, with its two levels of legal and ethical discussions, the debate between jurists as the means of non-production, and the interpretation of the different points of view expressed in the legal literature by a judiciary that was not hierarchically ordered. Efforts were rather concentrated on the creation of national codes and a hierarchically ordered judiciary. Law was conceived generally and obtains for a majority up until the present as codified law enacted by the political legislator.

What is at stake today is the content of these codes? This question is decided in a situation where religious scholars have lost control over the normative structure of Islam, and the new interpretations of Islamic law and religion has occurred. Jurists trained in modern law schools, sociologists, anthropologists, in short, academically trained intellectuals of all sorts, interact with the public on the question, "What is the normative structure of Islam? What is it that we want to see realized by Islam?" The debates take place no longer between factions and schools of religious scholars but between different religious movements within civil society, and also outside and against civil society. There is no other instance representing consensus and authority

¹¹ 'Izz al-Dîn, Mu'îl Yusuf, *Islamic law: From Historical Foundations to Contemporary Practice*. (Edinburgh: Edinburgh University Press, 2004), pp. 154-58; Oussama Arabi, *Studies in Modern Islamic Law*, pp. 19-38.

¹² Hisham M. Ramadan, "Toward Honest and Principled Islamic Law Scholarship," *Michigan State Law Review* (2006): 1573.

beyond the public at large.

We could see in Ottoman Constitution of 1876 and in some modern Muslim states (like United Arab Emirates), they have used the *Shari'ah* as a reference for vetting laws. The laws of the country are then decided in a codified form in a legislative assembly as today. The laws are then passed on to an Islamic instance of examination or a supreme court of Islamic scholars who can reject the laws and send them back to the legislature in they consider them to be contrary to the *Shari'ah*.¹³

One of the earliest and most successful efforts to develop a modern civil law was undertaken by Muslim jurists such as Ottoman scholar Ahmed Jawdat Pasha, who has headed to Majalla Committee, and Egyptian 'Abd al-Razzaq al-Sanhuri, who were well-trained in Islamic and in French law and who used the means of the comparative law to analyze the aims and functions of the norms of modern European and Islamic law. The latter constructed the Egyptian civil law code that has served as the basis for a common Arab civil law that is much more unified than European civil law. Since 1949 the Egyptian civil code has been received by almost all states in the Arab League: Iraq in 1951; Libya in 1953; Qatar in 1971; Sudan in 1971; Somalia in 1973; Algeria in 1975; Jordan in 1976; and Kuwait in 1980.

Some Muslim scholars are now discussing the use of comparative law methods for a comparison between Islamic and European norms and principles – and Islamic and European legal principles. They have established a new legal tool for the analysis of Islamic law that opened up the horizon for a reconstruction of Islamic law as an instrument for a new form of Islamic legality. This explains the great attraction of comparative law for a whole generation of the best Muslim jurists.

The end of the colonial era also brought an era of constitutionalism to the newly independent Muslim countries and to newly founded Pakistan. Colonial administrators had had little interest in encouraging the constitutionalist movement and constitutional forms of government. The newly independent national states found a welcome symbol of independence and statehood in constitutions. During the first twenty years or so most countries changed constitutions quickly and often, mostly when a coup d'état occurred.

In 1979 the Pakistani General Zia-ul-Haq created an addition to the Supreme Court and the four provincial high courts that existed in Pakistan since its foundation: a new federal *Shari'ah* court that was empowered to invalidate laws it deemed to be un-Islamic, and that, together with the *Shari'ah Bench* of the Supreme Court, has become the most effective instrument for an Islamization of Pakistani law outside of the Pakistani parliament.

¹³ Cf. Knut S. Vikør, *Between God and the Sultan: a History of Islamic Law*, (London: C. Hurst & Co. Publishers, 2005), pp. 254-59.

Much as in Western Europe and in other parts of the world, the foundation of such a constitutional judiciary brings about a growing control of the elected legislator by the nominated high judges. But the affect of this change depends very much on the institutional setting in which and the political background against which it takes place.

The principles of the Islamic *Shari'ah* are supral legislative norms, but they are not above the text of the constitution. They have to be harmonized with the public and private freedoms guaranteed by it. The Constitutional Court has developed a position on interpretation in which the classical principles of legal interpretation, the doctrine of the aims of the *Shari'ah*, the reference to principles of the *Shari'ah*, and the difference between norms that are unchangeable because they are based on unequivocally revealed texts, and thus changeable because they are based on conjectural legal reasoning, constantly occur in the texts of the decisions. The court uses them to legitimize its own reinterpretation of Islamic law.

The constitutions of 1956 and 1962, while containing articles on the Islamization of state and law, did not make these articles actionable as tools to invalidate laws enacted by Parliament, let alone to render null and void the constitution. The various attempts of provincial high courts and Supreme Court justices to raise the Objectives Resolution to the status of Pakistan's supreme norm remained unsuccessful until the middle of the 1970s. The situation changed dramatically with the military putsch of General Zia-ul-Haq in 1977, who ruled through martial law from 1977 to 1985. His coup d'état toppled the government of Zulfikar 'Ali Bhutto, whom he had executed in 1979. Pakistan's Supreme Court not only legitimated Zia-ul-Haq's putsch by the Doctrine of Necessity in 1977 but in 1979 also approved the hanging of the imprisoned former prime minister.

Zia-ul-Haq also brought about the specific structure of Pakistan's judiciary through creating the Federal *Shari'ah* Court of Pakistan in 1979. With all these measures he also weakened the political legislator vis-à-vis the judiciary, and in particular vis-à-vis the Islamic courts. The role of the Federal *Shari'ah* Court was strengthened in 1983, when it was given the power to examine all existing laws with respect to their compatibility with an Islamic legal system, employing a further step in the disempowerment of the elected legislator in favor of the appointed justices of the Federal *Shari'ah* Court.

The Federal *Shari'ah* Court's application of the principles thus derived was in no way universal. The principle of equality is clearly not applied to gender relations. Decisions on women under the *Hudûd* Ordinances often break the law and the constitution by their shocking disrespect of the woman's status as autonomous legal actors. In many cases they fall below the standard of the more than 1,000 years doctrine of the Hanafî school that was dominant on the Indian subcontinent. This doctrine gave women the right to marry without the permission or interference of a legal guardian,

a right that is increasingly called into question by the Federal *Shari'ah* Court. Also, the right to be heard was not extended to religion. Capital punishment for blasphemy is often pronounced, even if it is usually not carried out, and an automatic identity of certain religious doctrines with blasphemy is automatically and without any further procedure, established. The Ahmadīs are considered blasphemous. Due to the very nature of Islamic Law and the possibility of its adaptation to modern life the question arises: Can an authoritative law, which is regarded as firmly based upon divine revelation, so be adapted as to enable it to resolve the typical conflicts of industrial society?¹⁴

8.2.2 *The Future of Islamic Law in non-Muslim Countries*

There is another new debate on the partial application of Islamic law in non-Muslim countries like America and the United Kingdom. A typical dispute involving a debate of an Islamic law issue may arise in two different sets of cases. *First*, Islamic law may be applied as foreign law in accordance with the rules of conflict of law. *Second*, Islamic law issues may be addressed and decided by a foreign judge before the rules of local law may be applied. In these cases, the application of the local law requires the judge to interpret issues of Islamic law.¹⁵

Muslim populations are now spread widely throughout the world, both as a result of the earlier expansion of Islamic civilization and as a result of contemporary patterns of migration and conversion. The exchange between Islamic law and other laws thus often takes place beneath a constitutional umbrella of a host state, while the identification of the Muslim *ummah* becomes less precise, as host state laws displace, in variable measure, the application of Islamic law. This is the case even in Muslim countries such as Turkey. There are two models for this issue:

In the *first model*, Islamic Law is guaranteed formal status as the law of Muslim community like India and Nigeria in which Islamic personal law and inheritance law are applicable to Muslim minorities

The *second model* is that of most Western states, which are marked by the exclu-

¹⁴ Christopher Toll, Jakob Skovgaard-Petersen, *Law and the Islamic world past and present*, (Copenhagen: Royal Danish Academy, 1995), pp. 15-22; Baber Johansen, "The Future Contests of Islamic Law and Politics," <http://www.law.emory.edu/index.php?id=5121> (accessed 9/6/2009). See also: James N.D. Anderson, "The Future of Islamic Law in British Commonwealth Territories in Africa," in Hans W. Baade (ed.), *African Law: New Law for New Nations* (Dobbs Ferry: Oceana Publications, 1963), pp. 83-97; Cf., with explanation, Ziauddin Sardar, *The Future of Muslim Civilization* (London: Taylor & Francis, 1979), pp. 41-70.

¹⁵ Michael W. Suleiman, *Arabs in America: Building a New Future*, (Philadelphia: Temple University Press, 1999), pp. 102-4.

sivity of the state sources of law and hence deny in principle the existence of personal laws, either Christian or Islamic. But in many Western states religious tribunals may function privately for their adherents, and there are indications that Islamic Law adjudicators are increasingly active in settling disputes among Muslim people in these states. Islamic Law may therefore play an important role in the lives of Muslim people living in the West, whether or not it is recognized by the state. For example, the Archbishop of Canterbury called for Britain to adopt aspects of Islamic *Shari'ah* law alongside the existing legal system. His speech set off a storm of opposition among politicians, lawyers and others, including some Muslims. According to him, *Shari'ah* is "unavoidable" because it is effective. Islamic courts, Islamic banking, Islamic families, Islamic commerce all speak about religious rules directing the life of people in the UK. The challenge lies in the reality of *Shari'ah* and in its reach. *Shari'ah* challenges fundamental rights; and above all, *Shari'ah* challenges the law of the land.¹⁶

The Center for Islamic Pluralism (CIP) has issued a major survey of Islamist penetration of five Western European countries - the UK, Germany, the Netherlands, France, and Spain - and of the ideological apparatus, supporting the introduction of *Shari'ah* law in the West, that is associated with this campaign. The Report, written by believing Muslims, examines the agitation for the adoption of *Shari'ah* in non-Western societies, and its impact in four areas:

- Family and schooling
- Institutionalization of *Shari'ah* by non-Muslim governments ("Parallel *Shari'ah*")
- Criminal aspects
- Approach to Women.¹⁷

This Rapport analyzes in detail the work of the European Council for *Fatâwâ* and Research and examines the question of "Islamic finance." It concludes with a series of policy recommendations, including repudiation of any effort to establish "parallel *Shari'ah*" in the West, and a call for Muslim immigrants, especially religious functionaries, to affirm their loyalty to Western countries in which they reside by signature of a sacred oath.

There is another interesting improvement in Canada on the application of Islamic

¹⁶ H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, (Oxford: Oxford University Press, 2007), pp. 214-17; cf. Rowan Williams, "Civil and Religious Law in England: A Religious Perspective," 10 *Ecclesiastical Law Journal* 262-82 (2008); for the text of his speech see <http://www.archbishopofcanterbury.org/1575> (accessed 6/10/2009).

¹⁷ Irfan Al-Alawi, Stephen Suleyman Schwartz, Kamal Hasani, Veli Sirin, Daut Dauti and Qanta Ahmed, *A Guide to Shariah Law and Islamist Ideology in Western Europe 2007-2009*, (Washington: The Center for Islamic Pluralism, 2009), pp. 67-73.

law. Canadian judges will soon be enforcing Islamic law, or *Shari'ah*, in disputes between Muslims, possibly paving the way to administering criminal sentences one day. Muslims are required to submit to *Shari'ah* in Muslim societies but are excused in nations where they live as a minority under a non-Muslim government. Canada, however, is engaged in preparations for its 1 million-strong Muslim minority to be under the authority of a *Shari'ah* system enforced by the Canadian court system.

Muslim communities elected a 30-member council to establish the Islamic Institute of Civil Justice. The institute is classified in Islamic Law as a *Dar al-Qadhâ*, or judicial tribunal. Cases will be decided by a Muslim arbitrator, but the local secular Canadian court will be the enforcer. One of the obstacles to establishing the system has been the Muslim communities' lack of unity and organizational strength. Muslims in Canada come from many different countries and different schools of Islam. Also, there are few Islamic legal scholars, known as *ulamâ*, in North America, who are essential to adjudicating complex issues. The two main streams of Islam, Sunnî and Shi'ite, were represented at the conference, along with imams and leaders of organizations.¹⁸

As a summary we could agree with that in a democratic society, citizens retain the freedom – albeit within certain limits – to pursue their own lifestyle and to decide for themselves how they conduct their relationships with each other and with the government. But if their withdrawal from society starts to endanger basic rights and freedoms of others, then they have overstepped the mark and are damaging the democratic legal order. In this light, certain forms of *intolerant* isolationism do represent a particular threat: exclusivism in respect of one's own group and *parallelism*. Exclusivism is expressed through discrimination, incitement and sowing hatred. Parallelism does not recognize the authority of government seeks to impose religious laws before secular ones and tries to create enclaves in which that system rather than government authority prevails.¹⁹

8.3 The Islamic Jurisprudence Encyclopedia

The Science of Islamic Jurisprudence has undeniable significance, since it clarifies the provisions of our actions, including the worship of Allah and dealings with other human beings. It is the law against which Muslims weigh their actions: Is it permitted or forbidden? Correct or corrupt?

Islamic jurisprudence went through various phases, starting with the period of

¹⁸ http://www.wnd.com/news/article.asp?ARTICLE_ID=35850 (accessed 10/10/2009).

¹⁹ Algemene Inlichtingen- en Veiligheidsdienst – AIVD, *The Radical Dawa in Transition*, (The Netherlands, N.P., 2007).

the Prophet and the Companions of the Prophet, through the period of the Followers and then through the era of the industrious *Imâms*. Then the various diligence periods followed, and, as a result, numerous books on Islamic jurisprudence and its branches were published.

Because of the large quantity of information stored in these books in addition to the variety of ideological diligences on one matter, it became difficult to include all the legislative provisions in one ideology. This led to straying from the various ideologies. Due to this and the nature of the era during which it was written, there was a recapitulation of the ideology diligences that were summarized, needing clarification by providing difficult explanations and discussions that were useless except to those specialized in jurisprudential science. Consequently, calls arose to initiate a scientific project aimed at re-proposing Islamic jurisprudence in a way that coincides with the contemporary period regarding phrasing, publishing and the consideration of modern classification that easily and quickly achieves the obtainment of jurisprudent information in a credible and comprehensive way. So there was a persistent demand to publish a comprehensive encyclopedia on Islamic jurisprudence science that middle-class cultured people could easily understand and that would lead to the return of harmony between Muslims and their jurisprudence.

Aside from what was published in the jurisprudence encyclopedia, the Islamic library has also been enriched by solid research that deeply explores subjects in all their aspects. As a group effort that dealt with ideas and views before proposing them to the people, it is a way to save time for specialists – and others – in their legislative studies, especially in their higher education, judgments and legislation and to revive the jurisprudential heritage and nominate it for comparative international studies (which is the historical goal of the emergence of the encyclopedia idea).

The encyclopedia facilitates the return to Islamic legislation for deriving firm solutions for modern issues, especially with the general acceptance of developed legislations taken from Islamic laws, and it is also a means of inspiration for religious laws and to see what the pioneers extracted from the Holy Book and the *Sunnah* to organize all the affairs of life, which is the best way to please Allah Almighty and live a good life.

By completing the encyclopedia, Islamic jurisprudence is able to continue what science has reached with regards to the development of form and method. It combines guaranteed legitimacy and a rich heritage in order to close the gap that occurred between the rapid development in the world of publications and presenting information in ways that combine facilitation and quick achievement.²⁰

²⁰ See Mannâ' al-Qattân, *Târikh al-Tashrî' al-Islamî* (Beirut: al-Risâlah), pp. 340-45.

The encyclopedia is defined as the comprehensive publication for all or most of the scientific information presented through well-known titles, arranged in a certain way that does not need expertise or practice, and is written in a simplified way that does not need explanation by a teacher. Rather, it only requires the medium understanding of general culture and knowledge about science, and it is reliable because of its credible resources or its relation to reliable specialists who vowed to write them.

The characteristics of the encyclopedia that make its name well deserved are its comprehensiveness, facilitated order, simplified method, trustworthy resources. This characterization shows that the jurisprudence encyclopedia did not have these characteristics and that the basis of its order is the common terms in jurisprudence (which are the titles of its chapters and famous issues) and which are ordered alphabetically to enable the specialist or anyone else to search it. Its trustworthy quality comes from the evidence provided and authentic references, and it is necessary to coordinate between all its information, which achieves correlation, comprehensiveness and equal presentation.

The publishing of the encyclopedia was an old Islamic hope that revitalized the Muslim community, since many who were interested in Islamic national revolutions were looking forward to it. Most of the calls for completing this scientific project were represented by the calls issued during the first week of the Islamic jurisprudence conference in Paris in the year 1370 Hijrî (1951), in which a group of jurists in the Islamic world participated. Some of the recommendations called for the publication of this encyclopedia, including the Islamic rights according to modern methods and an alphabetized order.

Let us look at some projects relating to the Islamic jurisprudence encyclopedia:

8.3.1 *The Project of the Faculty of Sharî'ah at Damascus University*

When the faculty of *Sharî'ah* was established at Damascus University and Dr. Mustafa al-Siba'î was appointed as dean, the attempt at compiling a *jurisprudence encyclopedia* started. 1375 Hijrî (1956) saw the first official attempts to highlight this historical and global decision by a committee selected from the legislation faculty at Damascus University, created by a group that was empowered by the Egyptian Syrian Unit by a republican decision. In the year 1381 Hijrî (1961) samples of the encyclopedia studies were issued, for feedback purposes, written by jurists from two countries; then some initial works were issued, like the jurist dictionary by Ibn Hazm and the search directory for jurist terms. Unfortunately, this initiative was not successful.²¹

²¹ Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp.345-49.

8.3.2 *The Project of the Higher Committees' Council for Islamic Affairs in Cairo*

In Egypt the idea of the encyclopedia, which was embraced by the Ministry of Religious Endowments in 1381 Hijrî (1961) among the Higher Committees' Council for Islamic Affairs, resulted in the publication of its first parts (24) in the year 1386 Hijrî. The unity between Egypt and Syria in politics has made this initiative powerful. First eight volumes were published, ending with the word *isqât*. The committee decided to collect the opinions of eight law schools: Hanafîte, Mâlikîte, Shâfi'îte, Hanbalîte, Zâhirîte, Shi'îte Imâmiyyah, Shi'îte Zaidiyyah and Shi'îte Ibâdhiyyah.

The Association for Islamic Affairs in Cairo has attempted to publish an encyclopedia by the same methodology. They have established a committee composed of professors from al-Azhar University, and they have written 1500 pages of the encyclopedia and have started with family law. The first volume was finished in 1965 and was published immediately. But this project has failed as well.²²

8.3.3 *The Project of the Islamic Jurisprudence Encyclopedia in Kuwait*

This is a successful project and has been completed. In the year 1386 Hijrî (1976) – and with the emergence of the need to combine Islamic diligences to ensure the completion of this project in any Islamic region that had the finances and manpower needed – the Ministry of Religious Endowments and Islamic Affairs in Kuwait embraced this project and considered it a duty to present jurisprudence in a way that was modern and made it easy to learn. It called for the need to complete it to receive its rewards and relieve the Arab nation of any liabilities. The government of Kuwait has dedicated enough funds for this project and the academic leader was Mustafa al-Zarqa. They researched eight law schools as well: Hanafîte, Mâlikîte, Shâfi'îte, Hanbalîte, Zâhirîte, Shi'îte Imâmiyyah, Shi'îte Zaidiyyah and Shi'îte Ibâdhiyyah. They published three volumes as examples in 1972, and after that they started again in 1980, publishing the first volume in alphabetical order.²³

It should be mentioned that the numerous diligences in the name of Islamic jurisprudence are not as such disadvantageous, because of the lack of modern presentation and technical publishing. It has been noted of the encyclopedias that have appeared (in Kuwait and Egypt) that each follows a direction in which it seeks enriching

²² Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 349-52.

²³ Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 352-54.

jurisprudence in this field or in a way different from others, and that this variation does not satisfy the different needs or make the material accessible to those who requested it.

The Islamic Jurisprudence Encyclopedia of Kuwait (*al-Mawsû'ah al-Fiqhiyyah* (Encyclopedia of Islamic Jurisprudence) has forty-one volumes (Kuwait: Ministry of Awqaf [Religious Endowments], 1995); it does not include ideology discussions, personal favoritism and the techniques – even if the first two are mentioned in the jurisprudential references and the modern jurisprudential books are sometimes subjected to the latter for the following reasons.

A) Techniques. Whether it is positive or legislative, positivism is not considered to be Islamic jurisprudence, and because the legislative relies mostly on modern diligence or interpretations, its resources lie outside the timeframe of the original encyclopedia, apart from the different techniques used by the Islamic countries and its exposure to many modifications, whereas the older ones are less important after their most important quality, i.e. that of commitment, fades away.

This does not apply to pointing out some legal terms that became popular and are useful in distinguishing the jurisprudential terms from the legal or conventional terms the jurists do not want.

B) Personal Preference. What is meant by the preference outside the comprehensiveness of the encyclopedia is whatever was not conveyed by jurists during the last thirteen Hijrî centuries, and the personal opinion of the writer is forbidden and not proven unless he needs to show what he has understood from what was conveyed on the basis of the ideology origins.²⁴

We could mention some works that seem to belong to the idea of an Islamic jurisprudence encyclopedia:

- Wahbah al-Zuhayli, *al-Fiqh al-Islâmî wa Adillatuh* (Islamic Jurisprudence and its Proofs) (11 volumes) 5665 (Damascus: Dar al-Fikr al-Mu'asser, 1997).
- Abd al-Fattah Kabbarah, *al-Fiqh al-Muqâran* ([Islamic] Comparative Jurisprudence) (Beirut: Dar al-Nafa'is, 1997).
- Bakhtiar, Laleh, *Encyclopedia of Islamic Law: a Compendium of the Views of the Major Schools* (Chicago: Kazi Publications, 1996). Arranged by subject, this volume covers personal, family and social issues as well as civic, economic and religious obligations.

²⁴ *Al-Mawsu'ah al-Fiqhiyyah* (Encyclopedia of Islamic Jurisprudence) 41 Volumes (Kuwait: Ministry of Awqaf [Religious Endowments], 1995); http://www.islam.gov.kw/eng/topics/current/details.php?sdd48&cat_id=5 (03 July 2009).

- Bilmen, Ömer Nasuhi, *Hukuk-i İslâmiyye Ve Istılahat-ı Fıkhiyye Kamusu* (A Lexicon of Islamic Jurisprudence and Terminology of Islamic Law), vols. I-VIII (Istanbul: Bilmen Yayınevi, 1985). This is an *Encyclopedia of Islamic Law* with a classification of *fiqh* books.

8.4 Institutions of Islamic Fiqh (*Majma' al-Fiqh al-Islâmî*)

There are currently a few institutions of Islamic *fiqh* (*majma' al-Fiqh al-Islâmî*) in several Islamic countries in the world. One famous one is Majma' al-Fiqh al-Islâmî in Jeddah (IFA=Islamic Fiqh Academy) as a subsidiary organ of the Organization of the Islamic Conference (OIC), an Islamic academy providing courses and teachings in Islam.²⁵ There are also the *Majma' al-Fiqh al-Islâmî* for Rabitah al-Alam al-Islâmî (*Majma' Fiqh al-Islâmî*, Muslim World League)²⁶ in Sudan and India.²⁷ Their functions include producing *Fatâwâ* and answering questions posed by Muslims or non-Muslims. There are also Islamic academic centers that carry out related studies, such as The Center of Islamic Studies in Egypt and The Center of Sunnah Studies in Qatar.²⁸

In addition to those, there are other institutions that collect the viewpoints of ancient and modern '*ulamâ*' in various fields produced through publications, video compact discs, the internet and websites, such as Ibn Baz, Shanqiti, Fatwâ Online, Islam Online and *Dâr al-Iftâ'* in South Africa. Individual viewpoints from '*ulamâ*' or institutions like *Dâr al-Iftâ'* and al-Azhar House of Fatwâ can also be accessed directly through the Internet.

However, research centers and individual viewpoints obtained from the Internet regarding the *fatwâ* investigations are not comprehensive. They concentrate only on providing answers according to certain schools or giving responses to certain *fatwâ* questions or public research. There are none on various global factors or global *fatwâ* information as will be done by INFAD (World Fatwâ Management and Research Institute). The formation of INFAD was the brainchild of Tan Sri Dato' Dr. Mohd Yusof Hj Mohd Noor, the Chairman of USIM. The idea was made public during a press conference on 6 August 2002. It was agreed by the university to set up a special committee to prepare a proposal on the formation of this institution during a meeting held on 9 August 2002, chaired by USIM Vice-Chancellor, Prof. Dato Dr Abdul Shukor Husin. USIM Vice-Chancellor appointed this special committee on 27 August 2002. The proposal for the establishment was accepted in the eleventh Senate Meeting on 18 Octo-

²⁵ <http://www.fiqhacademy.org.sa> (accessed 3/7/2009).

²⁶ <http://www.islamhouse.com/ip/193005> (accessed 3/7/2009).

²⁷ <http://ifa-india.org/english/introduction.html> (3/7/2009).

²⁸ Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 339-40.

ber 2002 and approved in the sixth Meeting of the University's Board of Directors on 28 November 2002.

INFAD is also the first institution formed at a higher learning institution in Malaysia and in the world. It is not a body that produces *fatwâ* and does not take over the functions of established *fatwâ* bodies in Malaysia or abroad. INFAD is a research and consultation center for producing input based on research, information and experts that can help strengthen the *fatwâ* institution and to aid certain parties in making decisions and explaining certain policies needed or to provide or to be a source of authoritative information to other research institutions.

In Islamic countries the issuance of *fatwâ* is carried out by institutions or individual organizations like Pertubuhan Muhammadiyah dan Nahdatul 'Ulamâ' in Indonesia, or formal government institutions as in Malaysia. In this country, the function of issuing *fatwâ* is included within the jurisdiction of Islamic Law or Law of Syarak, whose power is given by the federal constitution to all the states in Malaysia, including Wilayah Persekutuan Kuala Lumpur, Labuan and Putrajaya. The responsibility to produce *fatwâ* is given to the *muftî* who is assisted by the *fatwâ* committee. Research will be carried out before a certain *fatwâ* is issued.

At the federal level, the National Fatwâ Committee was formed in 1970, under the National Council for the Malaysian Islamic Affairs. It was later transferred to the Islamic Affairs Division at the Prime Minister's Department in 1984 and eventually the Jabatan Kemajuan Islam Malaysia (JAKIM), the Prime Minister Department in 1997. The function of the National Fatwâ Committee is to discuss and coordinate issues regarding *fatwâ* at the national level.

INFAD has a more holistic, multidimensional and global scope, different from other foreign *fatwâ* organizations and state *fatwâ* committees and centers in Malaysia.²⁹

We should mention the Presidency of the Higher Committee of Religious Affairs (*Dîn İşleri Yüksek Kurulu*) in Turkey. It is an advisory committee for the Presidency of Religious Affairs. Its elected members are made up of distinguished religious scholars and its main duty is to complete research on the religious issues debated among the people, share their results with them, and provide full information to the people's questions in relation to religious issues in a complete scientific and open manner.³⁰

²⁹ <http://www.usim.edu.my/infad/uniqueness.htm> (accessed 3/7/2009).

³⁰ <http://www.diyenet.gov.tr/english/default.asp> (accessed 3/7/2009).

8.5 European Council for Fatwâ and Research

The European Council for Fatwâ and Research (ECFR) is a Dublin-based private foundation, founded in London on 29 - 30 March 1997 on the initiative of the Federation of Islamic Organizations in Europe. The European Council for Fatwâ and Research ('ECFR') is a largely self-selected body, composed of Islamic clerics and scholars, presided by Yusuf al-Qaradawi.

The ECFR aims "to present to the Muslim World and the Muslim minorities in the West particularly" its interpretation of "the manifestation of Allah's infinite mercy, knowledge and wisdom." For the ECFR, *Shari'ah* clearly embodies the superior rules for life. *Shari'ah* should therefore be respected as superior to civil law and to democracy: "the *Shari'ah* cannot be amended to conform to changing human values and standards, rather, it is the absolute norm to which all human values and conduct must conform; it is the frame to which they must be referred; it is the scale on which they must be weighed."

The ECFR is one of the main channels for the publications of *fatwâs* by Yusuf al-Qaradawi, a Muslim scholar affiliated with the Muslim Brotherhood, and his main English-language channel. Among other things, it wants to promote and control the local education of native *Imâms* for the Muslim minorities in European countries. It participates in such initiatives in France (in cooperation with the European Institute for Humanitarian and Islamic Studies and the United Kingdom. It is also striving to become an approved religious authority for local governments and private establishments in all countries where Muslims are a minority.

Its *fatwâs* often rely on the four classical Islamic law schools (four schools of *fiqh*), as well as the knowledge from all other schools of Islamic Law (*fiqh*), although it does exclude modernist Islamic scholars in Europe like the French former great *Imâm* from Marseille, Soheib Bencheikh and Zaki Badawi, president of the London-based Muslim College and a keen promoter of interfaith dialogue (who, among other things, regularly publishes material together with the Archbishop of York and the British Chief Rabbi). The *fatwâs* of the ECFR also insist on a strong priority for religious law over secular law.³¹

³¹ www.e-cfr.org; ECFR, *al-Majlis al-Urobbi li al-lftâ wa al-Buhûth*, (Cairo: Maktabah al-Iman, 1999), pp. 11-21.

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INDEX

A

- A Digest of Mohummudan Law*, 46, 267
A History of Islamic Law, 79
A Manual of Muhammadan Law According to the School of Shâfi'î, 52
A Study on the Theory of Islamic Law, 55, 59
 'Abbasid Caliph Abu Ja'far al-Mansûr, 178
 'Abbasid caliphate, 184
 'Abbasid Revolution, 302
 'Abd al-'Azîz ibn Sâlih al-Halwânî, 221
 'Abd al-'Azîz al-Sa'ud, 289
 'Abd al-Razzaq al-Sanhuri, 305, 306, 328, 330, 347
 'Abd al-Wahhâb al-Khallâf, 328
 'Abd-al-'Azîz ibn Ahmed al-Bukhârî, 56
 'Abdallah ibn 'Awf, 151
 'Abdallah ibn Abû Quhâfah, 125
 'Abdallah ibn Maimun, 195
 'Abdallah ibn Qa'nab, 156
 'Abdul 'Azîz ibn Su'ûd, 200
 'Abdullah 'Umar al-Dabbusi, 155
 'Abdullah ibn 'Umar, 124
 'Abdullah ibn al-Kawwa, 187
 'Abdullah ibn 'Amr ibn al-'Âs, 122
 'Abdullah ibn Ibâdh, 149, 174, 207
 'Abdullah ibn Mas'ud, 138, 151
 'Abdullahi Ahmed An-Na'im, 110, 255
 'Abdur Rahman ibn 'Awf, 129
 'Abdurrahman ibn al-Qâsim,, 44, 158
 abode, 343
 abode of treaty, 344
 abode of war, 344
 Abrahamic religions, 334
Abridgments, 58
 abrogated, 42, 115, 204, 256, 283
 abrogated verses, 204
 abrogating, 115
 absolute absence of similarity, 212
 Absolute Imitation, 226
 absolutism, 334
abstract /casuistic, 248
 abstract method, 10, 334, 335
 Abstract Method in Law, 334
 Abu 'Ali Juba'i, 184
 Abu 'Abdullah al-Qurtubi, 66
 Abu al-Hasan al-Mawardi, 54
 Abu al-'Alâ Mawdudi, 271
 Abu al-Hasan al-Ash'arî, 185, 210, 211
Abu al-Laith al-Samarqandi, 153, 222
 Abu al-Su'ûd Effendi, 69, 97, 237
 Abu Bakr, 31, 41, 42, 58, 62, 67, 72, 121, 122, 123, 125, 131, 133, 136, 140, 155, 165, 167, 173, 179, 187, 188, 189, 210, 359, 367
 Abu Bakr al-Baqillani, 210
 Abu Bakr ibn Abdurrahman, 137
 Abu Bakr Jassas al-Râzî, 65
 Abu Dhabi, 315, 316
 Abu Hafs al-Bukhârî, 153
 Abu Hafs al-Kabîr, 225
 Abu Hanîfa, 21, 40, 43, 48, 50, 86, 124, 133, 138, 142, 143, 145, 149, 150, 151, 152, 153, 154, 155, 156, 160, 161, 162, 170, 172, 173, 208, 228, 231, 326, 359
 Abu Hanîfa al-Thâni, 50
 Abu Hurayra, 135
 Abu Ja'far al-Mansûr, 140
 Abu Ja'far Muhammad ibn Jarir al-Tabarî, 64, 77
 Abu Mansur al-Mâturidî, 216
 Abu Musa al-Ash'arî, 124, 187, 210
 Abu Said al-Khudari, 342
 Abu Sulaymân al-Jurjânî, 153
 Abu Thawr, 149, 160, 167
 Abu Zaid Dabbusi, 47, 222
 Aceh, 283
 Achaemenid, 304
 acquisition, 29, 212
 Actions, 214
 Acts of God, 29
âdâb, 119
Adab al-Qâdhî, 41
'âdah, 9, 42, 43, 51, 52, 55, 57, 58, 60, 65, 73, 74, 77, 98, 109, 151, 152, 154, 155, 157, 159, 161, 162, 163, 166, 180, 184, 221, 222, 223, 225, 228, 229, 230, 374
'adâlah, 186, 342
adat, 70, 277, 278, 279, 282, 283, 284, 285, 286
 additional *sûrahs*, 129
 ademption, 30
 Aden, 316
adhân, 118
Al-Adillah al-Shar'iyyah, 257
 adjudicator, 29
'Adl Wal Insâf Fi Hal Mushkilât al-Awqâf, 327
administrative court system, 302
 administrative law, 6, 233, 257, 259, 320, 321

- administrative regulation, 261, 262
 adultery, 232, 233, 253, 254, 259, 291
Āfât Samâwiyah, 29
 affliction, 194
 Afghanistan, 155, 220, 253, 255
Afrasyab, 221
 Aga Khan, 205, 206, 207
 Age of Felicity, 109
 Age of Imitation, 223, 226
Age of Legal Interpretation, 121
age of light, 121
 Age of Principalities, 232
 Age of the Codification of *Fiqh*, 144, 323
age of truth, 121
 Agreements, 122
Ahādīth, 122, 140
Al-ahādīth al-qudsiyyah, 114
Ahkām al- Ahkām, 67
Al-Ahkām al-Sultāniyyah, 45
Ahkām al-Ahwāl al-Shakhsiyyah Lil-Muslimīn fi'l-Gharb, 88
Ahkām al-Dhimmiyyīn wal Must'manīn, 88
Al-Ahkām al-Ja'fariyya fil-Ahwāl al-Shakhsiyyah, 108
Al-Ahkām al-Mufassalah, 259
Al-Ahkām al-Mujmalah, 258
Ahkām al-Qur'an, 65, 66
Ahkām al-Qur'an al-Karīm, 65
Ahkām al-Qur'an, 65, 66, 67, 68
Al-Ahkām al-Shar'iyyah Fi al-Ahwāl al-Shakhsiyyah, 327
Al-Ahkām al-Shar'iyyah fil-Ahwāl al-Shakhsiyyah, 108
Al-Ahkām al-Sultāniyyah, 43, 320, 321
Ahkām al-Zimmiyyīn wa al-Musta'manīn, 87
ahklāqiyyāt, 21, 22
ahl al- 'adl wal istiqāmah, 188
ahl al-athar, 139, 156
ahl al-bayt, 114, 189
ahl al-bid'ah, 180
Ahl al-Bid'ah schools, 10, 147
Ahl al-Bid'ah Theological Sects, 183
Ahl al-Hadīth, 141, 167, 176, 140, 209
ahl al-Iraq, 178
ahl al-Kitāb, 173
ahl al-ra'y, 73, 141
Ahl al-Sunnah, 133, 199, 211, 212, 163, 180, 183, 198, 208, 213
Ahl al-sunnah wal-jamā'ah schools, 9, 147
Ahl al-Tawhīd, 209
Ahl al-Tawhīd wa al'Adl, 184
 Ahmad ibn 'Abdullah ibn Muhammad ibn Bashir Khan, 328
 Ahmad ibn Hanbal, 137, 143, 149, 160, 161, 162, 163, 166, 210, 359
 Ahmad Jawdat Pasha, 107, 329
 Ahmadī *fiqh*, 204
 Ahmadīs, 202, 203, 204, 205, 270, 349
 Ahmadiyyah, 201, 202, 203, 204, 205
 Ahmadiyyah Muslim Community, 203, 205
Ahmadiyyah Muslim Jamā'at, 202
 Ahmed ibn Hanbel, 143
 Ahmed Jawdat Pasha, 107, 249, 250, 360
Al-Ahwāl al-Shakhsiyyah, 86, 241
akcha, 95
Akhbārī, 170, 171
akhlaqiyyāt, 19
 Akkadian, 304
A' lām Qamus li ashhar al-Rijāl wa al-Nisā, 73
Alamgiriyyah, 98
 Ala'uddawlah Beg, 232
 Ala'uddin al-Khaskafi, 229
 Alawi, 300, 303
 Albania, 155, 249
 alcoholic beverages, 115
alcoholic drinks, 115
 Aleppo, 86, 257, 303, 329
 Alfred von Kremer, 33
 Algeria, 90, 158, 207, 313, 314, 315, 329, 347, 362
 Ali Chelebi Qinalizadah, 221
 Ali Haydar, 30, 107, 320, 322, 329, 330, 360
 Ali ibn Abu Tālib, 123, 125, 129, 138, 151, 170, 171, 186, 190, 191, 210
 Ali ibn Ahmad al-Wāhidi, 122
 Ali Muhammad al-Pazdawi, 155
Ālim, 100, 175, 230, 360
 Ālim ibn 'Alā al-Hanafi, 230
 alimony, 253, 283, 295, 320
 alms, 22, 198, 320
alqāb, 70, 73
 Alqamah, 138, 151
 Altinordu, 230
'amal, 185, 187
'Amal Ahl al-Madina, 138, 157
Amāli, 191, 153
'amaliyyah, 10, 21, 147
'amaliyyāt, 19, 21, 22
 America, 349, 374
 Āmid, 233
amīr al-mu'minīn, 37
 amputation, 253, 288, 291
 analogy, 3, 28, 48, 51, 123, 141, 152, 167, 170, 257
 Anas ibn Mālik, 135, 142, 151, 174
 Anatolian peninsula, 317
 Anatolian Seljukids, 105, 224, 324
Anglo-Chinese, 278, 280
Anglo-Hindu, 278, 280
Anglo-Muhammadan, 266, 280
 Anglo-Muhammadan Law, 80, 264, 265, 266, 268, 276, 329
Anglo-Muslim law, 278, 280
anjuman, 203
Anjuman Ishā'at-e-Islam, 202
 Annotations, 228

- announcer, 29, 112
ansâb, 73
Ansâb, 209
Ansâr, 123, 130, 131
Anwâr al-Qur'an fî Ahkâm al-Qur'an, 65
 apostasy, 4, 253, 288, 343
 appeal, 29, 138, 197, 198, 283, 291, 297, 299, 303, 315, 317
 appeals court, 283
 application of Islamic law, 115, 282, 283, 286, 287, 349
 application of Ja'fari law, 302
 application of the *Shari'ah*, 149, 255
 applications of *fiqh*, 149, 154
 Applied Islamic Law, 39, 221, 222
 Applied References, 94
Aqidah, 174, 210, 216
'aql, 170, 173, 184
 Aqqoyunids, 231, 233
Aqrab al-Masâlik li Madhhab al-Imâm Mâlik, 53
aqwâl, 43
 Arab League, 347
 Arab Revolt, 304
 Arab states, 346
 Arabian Desert, 304
 Arabian Gulf, 289
 Arabian Peninsula, 109, 289, 316
 Arabic language, 143, 154, 161, 166
 Arabic poetry, 159
'aradh, 214
 arbitrary will of the ruler, 252
 arbitration, 186, 187, 188, 263, 269
 arbitrator, 210
 Archbishop of Canterbury, 350
 Archival Documents, 102
 Area Court, 299
 artificial insemination, 297
 Arya Samaj, 202
 Asad ibn al-Furât, 44, 158
Asadiyyah, 44, 158
asâmi, 73
Asbâb al-Nuzûl, 122
Ashâb, 98, 167, 168, 199, 257
Ashâb al-Kirâm, 257
ashâb al-ra'y, 167
Ashâb al-Suffa, 135
ashâb al-Zâhir, 168
ashâ'irah, 210
 Ash'arî School, 192, 210
 Ash'arî theology, 216
 Ash'arîs, 185, 216
 Ash'arîte school, 211
 Ash'arîte School, 210, 220
 Ash'arîtes, 210, 212, 213, 214, 215
 Ash'ath ibn Qais, 186
Al-Ashbâh wa'l-Nazâ'ir, 84
'ashir, 239
'Ashûra, 192
aslah, 211, 219
asmâ', 74
Asnâ al-Matâlib, 52
Asr al-Sa'âdah, 109
Asr al-Taqlid, 223
asr tawâ'if al-mulûk, 232
 Assyrian, 304
 Aswad, 138, 151, 177
 Atâ'i, 73
Atabekliks, 224
Atharî creed, 210
 Atlantic Ocean, 145, 297
 Attributes of Allah, 196, 211
 attributes of God, 196
 attributes of Islamic Law, 27
 Austria, 343
Aval, 30
Avallo, 30
Avan-project de code du droit Musûlman Algerien, 314
 Averroes, 45, 215
awqâf, 293
Awwal, 155
Awza'i, 46, 149, 157, 208
Awza'i School, 176
Awza'iyya, 148
A'yân al-Shî'a, 74
 Âyât al-Ahkâm, 65, 66, 67, 68
 Âyatollah Sayyid Muhammad Hussein Tabataba'i, 65
'Ayniyyah, 198
 Ayyubids, 96, 234
Azâriqah, 188
 Azerbaijan, 128, 138, 188, 190, 192
 Azhar House of Fatwâ, 356
 Azhar University, 60, 192, 210, 328, 354
Azraqis, 188
- B**
- Ba'albek, 176
bâb, 151
 Babur State, 230
 Babylonian, 304
Badâyi' al-Sanâyi' fi Tartîb al-Sharâyi', 40, 41, 234
Badî' al-Nizâm, 59
 badness, 213, 214
 Badr al-Dîn Muhammad al-Zarkashî, 58
 Baghdad, 19, 42, 72, 87, 108, 114, 138, 139, 140, 143, 150, 154, 155, 159, 160, 162, 163, 164, 166, 167, 179, 199, 210, 221, 224, 226, 259, 304, 320, 345, 375
 Baghdad (Kufic) School of Fiqh, 136, 138
Bahr al-Muhîr fî Usûl al-Fiqh, 58

Bahr al-Râiq, 50
 Bahrain, 162, 171, 188, 190, 192, 196, 295
 Al-Bâ'ith al-Hathîth Sharh Ihktisâr 'Ulûm al-Hadîth, 63
 Bangladesh, 220, 253, 264, 275
 Banu Hâshim, 173
Baqliyyah, 195
barâ'ah, 207
Bashâ'ir al-Darajât fi Ulûm al-i Muhammad wamâ Khassahum bihi, 171
 basics of faith, 147
 basis of knowledge, 218
Basîl, 43, 225
 Basra, 128, 137, 139, 143, 148, 175, 176, 183, 188, 196, 199, 210, 306
bâtil, 10, 148
bâtin, 194
 Bâtinites, 182
 Bâtiniyyah, 194, 195
 Battle of Badr, 118
 battle of Khandaq, 122
 Battle of the Camel, 189
 Battle of Yamama, 121
Bay'ah, 172
 Bayânites, 182
Bayt al-mâl, 125
 beglerbegi, 199, 200
belief, 19, 21, 22, 35, 76, 110, 147, 170, 181, 182, 183, 186, 194, 196, 197, 203, 204, 208, 211, 212, 216, 219, 224, 226, 268, 283, 374
 Berber, 315
 Bibliographical Sources, 74
bid'ah, 119, 131, 182
bida', 175
Bidâyah al-Mujtahid wa Nihâyah al-Muqtasid, 77
Bidâyat al-Mubtadî, 42
Bihâr al-Anwâr, 64
 Biographical Sources, 71
 biography, 116, 119
 Bishr al-Marrisi, 163
Bismillah, 127
 blasphemy, 349
 blood money, 109, 291
 Blossoming Age of *Fiqh*, 144, 323
 Bohras, 206
 Bombay, 34, 80, 206
 Books and Works by Non-Muslim Scholars, 78, 81, 82
 Books by Muslim Scholars in Western Languages, 82
 Books of *Fatâwâ*, 97, 229
 Books of *Fiqh*, 39
 Books of *Hadîth* on Legal Rules, 62
 Books of Hanafite, 155
 Books of *Nizâmât*, 103
 Books of *Tabaqât*, 71

Books of Tafsîr, 64
 Books of *Usûl al-Fiqh*, 55
 Books of *Usûl al-Fiqh* according to the Method of Theologians, 57
 Books on Ahkâm al-Qur'an, 65
 Books on Differences among Islamic Law Schools, 76
 Books on Hadîths, 60
 Books on Legal Maxims of Islamic Law, 84
 Books on Muslim Minorities, 88
 Books on Religious and Philosophical Sects, 77
 Books on the Science of Qur'an Interpretation, 68
 Books on the Science of Tradition, 63
 Books on *Usûl al-Fiqh* according to the Hanafi (*Manhaj al-Fuqahâ*) Method, 55
 Books on *Usûl al-Fiqh* That Combine Both Methods, 59
 Bosnia, 155, 249
Bozoq Codification, 233
 British colonial courts, 265
 British colonial government, 273
British Colonial Law, 278
 British colonial rule, 285
 British Malaya, 277, 280, 285
 Brockelmann, 78, 84
 Brunei Darussalam, 276
 Buddhists, 269
 Bughra Khan, 221
 Bukhâra, 221, 222, 223, 225
Bulûgh al-Marâm min Adillâh al-Ahkâm, 62
burhân, 181
Burhân, 57, 225
Al-Burhân fi 'Ulûm al-Qur'ân, 68
 burial of the dead, 112
 Burma, 276
Burmese-Buddhism, 280

C

Cairo, 6, 19, 21, 27, 31, 33, 34, 39, 41, 79, 83, 86, 87, 88, 108, 117, 120, 123, 154, 155, 159, 162, 166, 169, 174, 177, 183, 184, 185, 192, 196, 210, 223, 226, 234, 238, 320, 328, 342, 354, 358, 359, 360, 361, 362, 363, 366, 368, 370, 371, 373
 Caliph 'Umar, 30, 121, 123
 Caliph 'Uthman, 128
 Caliph Abu Bakr, 121, 192
 Caliph al-Ma'mun, 163, 166
 Caliph Harun-al-Rashid, 41
 Caliphate of Abu Bakr, 130
 Caliphate of Cordoba. Caliph Mu'âwiya, 134
 call to prayer, 118, 260
 Cambodia, 276
 Canadian court, 351
 capital punishment, 291

- Capital punishment, 349
- Carmathians, 195
- case law, 10, 201, 335
- case of necessity, 337
- Cassation Court, 291, 302
- Casuist Method, 331
- Casuistry, 331
- causation, 30
- Center of Sunnah Studies, 356
- Central Asia, 79, 104, 216, 220, 318
- Ceylon, 162
- Chagatai Khans, 230
- chain of transmission, 113, 156
- Characteristics of Islamic Law, 25
- charitable trusts, 278
- Charities, 321
- chastity, 233, 243
- Chief *Shari'ah* Judge, 287
- child care, 321
- child marriage, 261, 278
- Child Marriage Restraint Act, 273
- China, 145, 220, 285
- Christian minority, 296
- Christianity, 3, 4, 24, 33, 204, 295, 302
- Christians, 24, 168, 204, 269, 300, 302, 303
- Circassian Mamlukids, 234
- civil and criminal appeals, 272
- civil and criminal jurisdiction, 272
- Civil cases*, 291
- Civil Code, 23, 248, 263, 274, 295, 303, 304, 305, 306, 307, 309, 315, 328, 332
- Civil Code of the Ottoman State, 23, 246
- civil courts, 246, 269, 287, 316
- civil law, 26, 30, 245, 247, 248, 249, 265, 282, 283, 287, 294, 295, 301, 315, 327, 341, 347, 358
- Civil Law, 319, 320, 328, 331, 366
- Civil Procedure Act 1983, 309
- Civil Procedure Code*, 305
- civil servants*, 69, 97, 223, 248, 249, 342
- Civil Transactions Act 1983, 309
- classical legal texts, 227
- classification of Islamic rules, 341
- Classification of *Shari'ah* Injunctions, 256
- Code Civile*, 248
- Code Napoleon*, 248
- Code of Civil Procedure, 303
- Code of Civil Status, 303
- Code of Mohammedan Personal Law*, 108
- Code of Muslim personal law of the Philippines, 253
- Code of Personal Status, 298, 299, 303, 306
- Codes of Law, 106
- codification, 10, 39, 48, 62, 82, 104, 105, 107, 108, 114, 145, 231, 232, 233, 237, 238, 244, 247, 248, 249, 267, 286, 293, 306, 314, 323, 324, 325, 326, 327, 328, 329, 330, 336, 337, 338, 367
- Codification in Islamic Law, 323, 330
- Codification of Islamic Law, 2, 336
- codified law, 346
- Codifying *Hadiths*, 135
- colonial administration, 267, 268, 279
- colonial masters, 341
- colonial powers, 254
- Colonial Reformulation of Islamic Law*, 277
- colonization, 313, 341, 345
- commentaries, 43, 47, 48, 49, 50, 52, 54, 56, 59, 61, 64, 154, 161, 228, 267, 290
- Commentaries on the Qur'an, 64
- commercial law, 244, 257, 271, 306, 320, 327, 332
- committees of *al-Ahwāl al-Shakhsiyyah* and *Wājibat*, 245
- common law, 28, 29, 268, 271, 285, 299, 307, 329, 341
- Companions, 9, 36, 72, 117, 118, 120, 121, 122, 123, 124, 125, 126, 131, 132, 133, 134, 135, 136, 137, 139, 143, 147, 151, 152, 156, 157, 160, 164, 167, 174, 175, 180, 186, 199, 208, 209, 252, 257, 351
- Companions of the Prophet Muhammad, 120
- Comparative and Contemporary Books by Muslim Scholars, 85
- Comparative and Contemporary Books on *Fiqh*, 85
- Comparative and Contemporary Books on Shī'a, 88
- Comparative and Contemporary Books on Usūl al-*Fiqh*, 88
- Comparative Inter-*Madhhab* Law, 222
- comparative law, 77, 225, 254, 330, 347
- compendia of *hadiths*, 135
- compendium, 43, 49, 50, 51, 53, 54, 55, 56, 57, 59
- compendiums, 42, 47, 153
- compilation of *hadith*, 144
- Compilation of Islamic Law*, 281, 283, 284
- Comprehensible (*Ma'qūl al-Ma'nā*) Injunctions, 260
- Comprehensive Principles of Law, 258
- compulsion, 192, 219
- compulsory, 119, 198, 271, 286
- compurgation, 109
- conduct, 19, 21, 22, 31, 35, 119, 128, 343, 358
- Conflicts among the Companions, 132
- consensus, 3, 34, 130, 131, 143, 152, 157, 167, 170, 175, 209, 257, 282, 308, 338, 346
- consequentialism, 334
- Constitution of Medina, 110
- Constitutional Council, 301
- Constitutional Court, 308, 348
- constitutional law, 6, 25, 27, 29, 102, 257, 259, 292, 304, 315
- Constitutional Status of Islamic Law, 297
- constitutionalism, 110, 347
- contemporary law, 321
- Contemporary Practice of *Shari'ah* Law, 251
- contract of giving Tamim Ad-Dari, 122
- contracts, 19, 29, 31, 95, 224, 321

contractual agreement, 344
 corporal punishment, 291
corpus juris, 97, 154
 Corpus Juris Civilis, 33
 Council of Religion and Malay Custom, 287
 Court of Cassation, 293, 294, 303, 315
court system, 27, 269, 281, 282, 294, 301, 306, 308
 courts of appeal, 297, 298, 301, 302, 315
 Courts of Appeal, 283, 300, 317
Courts of Personal Status, 305
 creation of deeds for human beings by God, 198
 creation of the Qur'an, 163, 198
Criminal cases, 291
 Criminal Court, 315
 criminal law, 47, 96, 232, 244, 254, 257, 265, 288
Criminal Law of the Muhammadus, 265
 Criminal Procedure Act 1983, 309
 Criterion of Good and Evil, 212
 criterion of truth, 218
 Crusades, 28, 30, 31
Culturgeschichte des Orients unter den Chalifen, 33, 78, 375
 Çüngüş, 233
 custody, 270, 273, 275, 287, 295
 custom, 23, 112, 267, 268, 275, 277, 278, 281, 286, 290, 292, 295, 296, 304, 307, 308, 317, 332
 customary, 105, 109, 119, 236, 268, 282, 286, 298, 299, 300, 343
 Customary Courts of Appeal, 300
 customary law, 109, 236, 238, 267, 269, 276
 Customary law, 232, 267
 Cyprus, 249

D

Dabbus, 40, 222
Dafâtir-i Muhimmah, 102
Dafâtir-i Tapu and Tahrîr, 103
 Dagistan, 162
Dajjâl, 204
Dala'il al-Maram fi Tafsîr Âyât al-Ahkâm, 67
dalîl, 10, 168, 335
al-dalîl al-kullî, 10, 335
Dâmâd, 47, 50, 237, 363
 Damascus, 35, 39, 51, 69, 74, 85, 88, 104, 109, 114, 128, 133, 137, 139, 140, 143, 148, 165, 188, 189, 224, 245, 264, 303, 330, 353, 355, 366, 375
 Damascus University, 85, 353
dâr al-'Ahd, 344
Dâr al-Amân, 341
Dâr al-Iftâ', 356
dâr al-Islam, 344
Dâr al-Kufr, 188, 344
Darul-Qadhâ, 351
 David, 80, 90, 92, 93, 204
 Davud-u Zâhirî, 143

Dâwud ibn 'Ali, 149
 Day of Resurrection, 212
 deanthropomorphism, 212
 Decisions of Pardoning, 122
 Decrees of Timur, 104
 deduction, 21, 49, 124, 140, 152, 164, 165, 225
 deductive, 346
 defamation, 259
 defense of necessity, 30
 democracy, 284, 345, 358
 Denmark, 343
 Detailed Injunctions, 259
 Development of Muslim Theology, Jurisprudence and Constitutional Theory, 79
 Devotions, 319, 320
dha'îf, 165
Dhakhîra al-Riwâyah, 221
Dhakhîrah, 45, 99, 100
Dhakhîrah al-Fatâwâ, 99
Dhakhîrah al-Burhâniyyah, 99
 Dhakhîrah for Ahmad ibn Idris Shihabudîn as-Sanhaji al-Qarafi al-Mâlikî, 45
dhalâl, 180
dhimmî, 132, 241
 Dhulqâdirids, 231, 232, 233
 Al-Dibaj al-Mudhahhab fi Ma'rifat A'yân Ulamâ' al-Madhhab, 74
difficulty, 4, 114, 121, 259, 269, 279
Digest of Criminal Law, 265
Digest of Muhammadan Law, 265
Digests of Muhammadan law, 265
 diplomats, 31
 Dirârites, 183
dirham, 127
 Dissolution of Muslim Marriages Act, 262, 273
 District Courts, 283, 300
 Divine Acts, 212
 Divine amnesty, 216
 Divine Attributes, 211
 Divine command, 214, 260
 divine essence, 197
 Divine Legislator, 322
 divine omnipotence, 185, 217
 divine power, 193
 divine reformer, 201
 divine revelation, 25, 112, 117, 119, 182, 184, 204, 216, 218, 260, 262, 264, 333, 349
 divine text, 164
divine unity, 7, 342
 Divine Unity, 184, 261
 Divine Will, 211
 divine wisdom, 218
 divinely-ordained, 260
 divorce, 36, 156, 254, 255, 261, 262, 263, 269, 271, 277, 279, 281, 282, 283, 284, 286, 287, 292, 295, 297, 302, 305, 314, 315, 320, 321
dîwân, 37, 132

Dîwân al-Humayûn, 102, 237
Dîwân al-Inshâ, 75
Dîwân Jâbir ibn Ziyâd, 174
Dîwân-i Ahkâm-i Adliyyah, 249
diyâh, 109
diyânât, 185
diyânatan, 26
Diyarbakir, 233
diyât, 309
doctrinal legal schools, 27
Doctrine of Necessity, 348
Dowry and Bridal Gifts, 274
drinks, 133, 321
drug smuggling, 291
Druze, 194, 300, 302, 303, 365
Druze courts, 302
dual legal system, 297
dual system, 253, 297
Dubai, 315
Dublin, 357
Durar al-Hukkâm Sharh Majallat al-Ahkâm, 107, 30, 50, 320, 322
duress, 29
Durr al-Mukhtâr, 51, 229
Dustûr, 106
Dutch, 34, 78, 277, 279, 281, 282, 283, 284, 286
Dutch Colonial Law, 278
Dutch colonial system, 279
Dutch East Indies, 279, 282
Dutch law, 278, 281
duties of a *Qâdhî*, 41

E

Earnest Money, 244
East Africa, 52, 206, 207
East Indies, 52, 276, 277, 279, 282
ECFR, 357, 358, 363
Egypt, 10, 23, 33, 43, 75, 78, 93, 100, 104, 107, 128, 134, 136, 139, 143, 159, 160, 162, 168, 177, 178, 200, 201, 205, 209, 234, 249, 253, 261, 293, 294, 295, 296, 327, 328, 335, 336, 337, 354, 356, 362, 367, 368, 370, 371
Egyptian civil code, 347
Egyptian jurists, 347
Egyptian law, 261, 294, 295
eighty lashes, 132, 133
elected legislator, 348
emanationism, 194
emîn, 96
Emîr Kâtib al-Itqâni, 228
Emîr of Najd, 198, 199
Emîr Timur, 104
Emîrate of Sicily, 28, 31
Encyclopedia of Islam, 37, 79, 363
Encyclopedia of Islamic Jurisprudence, 355, 362

Encyclopedia of Islamic Law, 83, 89, 355
Endowments, 69, 321, 327, 355
Enforcement of *Hudûd*, 274
Enforcement of *Shari'ah*, 274
enforcer, 29, 351
English common law, 28
Eritrea, 220, 312
Eschaton, 201
esoterism, 194
Essence, 186, 211
eternal attributes, 186, 198
eternal happiness, 124
Ethiopia, 33, 312
Euphrates, 304
European commenda, 30
European Council for Fatwâ and Research, 357
European Court of Human Rights, 253
European law, 327
European legal imperialism, 277
European legal system, 318
Europeans, 277, 278, 282, 292
Evidence Act 1983, 309
evil, 26, 113, 183, 185, 186, 211, 213, 214, 215, 216, 217, 219, 342
Exegeses, 228
exhaustive investigation, 123
experimental method, 55
external submission, 181
extinct schools of *fiqh*, 175
Extinct Schools of Law, 175
extraterritorial jurisdiction, 343
extraterritorial theory, 343

F

Faculty of *Shari'ah*, 353
Fahrudîn Qâdhîhan, 229
faith, 10, 64, 110, 112, 117, 118, 120, 148, 152, 159, 181, 185, 187, 190, 193, 194, 195, 197, 198, 202, 206, 213, 216, 221, 254, 264, 274, 277, 290, 333
Fakhr al-Dîn Razi, 215
Fakhr al-Islam 'Ali Pazdawî, 223
Fakhr-al-Dîn Muhammad ibn Umar al-Râzi, 58
Falsafat al-Tashrî' fil-Islam, 87
Family Courts, 270, 272, 273, 275
family law, 6, 47, 109, 113, 253, 254, 255, 256, 257, 264, 268, 270, 271, 274, 275, 276, 277, 278, 279, 280, 281, 282, 284, 286, 287, 288, 289, 290, 292, 293, 295, 298, 302, 304, 305, 306, 307, 308, 309, 310, 312, 313, 314, 315, 316, 317, 320, 354, 359
Family Law, 80, 90, 92, 94, 110, 245, 251, 264, 265, 266, 269, 273, 294, 296, 297, 298, 299, 300, 302, 304, 326, 342, 359, 361, 365, 376
faqîh, 20, 21, 32, 39, 46, 181

- fardh*, 119
fâsiq, 212
fasl, 151
 fast of Ramadan, 182
fatâwâ, 9, 41, 89, 97, 98, 100, 139, 140, 157, 158, 160, 222, 229, 246, 248, 287, 288, 329
Fatâwâ 'Abd-al-rahim, 101
Fatâwâ Abu al-Su'ûd, 100
Fatâwâ Ahl Samarqand, 98
Fatâwâ al-'Âlemgiriyyah, 101, 230, 265, 268
Fatâwâ al-Anqarawi, 100
Al-Fatâwâ al-Bazzâziyyah, 100
Fatâwâ al-Fawdhîyyah, 97
Al-Fatâwâ al-Hâmidiyyah, 100
Al-Fatâwâ al-Hindiyyah, 97, 98, 231, 362
Fatâwâ 'Ali Effendi, 100
Al-Fatâwâ al-Jhangiriyyah, 231
Al-Fatâwâ al-Kubrâ al-Haythamiyyah al-Fiqhiyyah, 101
Fatâwâ al-Qâdhî han, 229
Al-Fatâwâ al-Tatarkhânîyyah, 98, 100, 104, 230, 324, 360
Al-Fatâwâ al-Walwâlîjiyyah, 99
Fatâwâ al-Zâhiriyyah, 99
Fatâwâ al-Zarkashi, 101
Fatâwâ books, 237
Fatâwâ Faydhîyyah, 101
Fatâwâ Hindiyyah, 105, 324
Fatâwâ ibn al-Salâh, 101
Fatâwâ Ibn Taymiyyah, 165
Fatâwâ Mu'âsirah, 88
Fatâwâ Zayniyyah, 100
Fatâwâ-e-Alamgiri, 105, 324
Fatâwây-i Qâdhikhan, 99
 fate, 51, 183
 Fath al-'Ali al-Mâlik fi-'l-Fatwâ 'ala Madhhab al-Imâm Mâlik, 101
Fath al-'Azîz 'ala Kitâb al-Wajîz, 43
Fath al-Bârî, 61
Fath al-Mu'in, 52
Fath al-Qadîr, 42, 174, 228
 Fath al-Qarîb al-Mujîb ila Sharh Alfâz al-Taqrîb, 51
Fath al-Wahhâb, 52
 Fâtima, 189, 190
 Fatimid Empire, 191
 Fatimids, 205
fatwâ, 86, 97, 98, 101, 156, 157, 170, 192, 266, 267, 339, 356, 357, 358
Fatwâ Collections of Hanafî school, 98
Fatwâ Collections of the Mâlikî School, 101
Fatwâ Collections of the Shâfi'î School, 101
fatwâ committee, 357
fatwâ committees, 288
fatwâ institution, 357
Fatwâ Online, 356
Fatwâ-i Sharîfah, 98
 Federal Sharî'ah Court, 271, 272, 300, 348
 Federation of Islamic Organisations in Europe., 357
 female imâms, 188
 fief, 106
Fihrist al-'Ulûm, 74
Fihrist Kutub al-Shi'a, 75
finality of {Muhammad's} prophethood, 203
 financial law, 6, 96, 102, 103, 257, 321
 Financial transactions, 321
 fines, 233
 Finland, 343
fiqh, 5, 9, 10, 19, 20, 21, 22, 23, 25, 26, 35, 40, 41, 43, 44, 45, 46, 47, 55, 57, 58, 62, 65, 66, 68, 70, 71, 72, 76, 78, 85, 87, 88, 98, 101, 134, 137, 140, 142, 145, 147, 148, 149, 151, 155, 156, 158, 160, 161, 162, 167, 168, 170, 173, 174, 178, 180, 183, 221, 236, 237, 244, 246, 247, 248, 254, 257, 275, 288, 289, 296, 304, 307, 319, 321, 322, 323, 324, 325, 326, 328, 329, 330, 333, 336, 338, 355, 356, 367
Fiqh alâ al-Madhâb al-Khamsah, 89
Fiqh al-Akbar, 40, 152
Fiqh al-Aqalliyât, 85, 88
Fiqh al-Aqalliyât al-Muslimah, 88
Fiqh al-Imâmiyyah, 46
Fiqh al-Islâmî 'ala Madhhab al-Mâlikî, 85
Fiqh al-Islâmî wa Adilatuhu, 85
Fiqh al-Islâmî wa Adillatuh, 355
Fiqh al-Ja'farî, 46
Al-Fiqh al-Muqâran, 355
fiqh al-Qur'an, 65, 66, 68
Fiqh al-Qur'an fi Âyât al-Ahkâm, 67
Fiqh al-Zakâh, 86
fiqh books, 26, 35, 40, 62, 71, 72, 151, 155, 237, 326, 356
Fiqh lil-Mughtaribîn, 88
fiqh madhhabs, 149
Fiqh School, 149
Fiqh Schools, 10, 142, 148, 149
fiqhî madhhabs, 336
fiqhî mentality, 336
Firman, 96, 98, 102, 243
 fiscal law, 273
fişq, 180
Fitnah, 131
 Fitzgerald, 34
 flogging, 254
 followed (*matbû'ah*) schools, 149
 Followers, 72, 81, 133, 137, 157, 174, 207, 351
 followers of Ali, 190
 followers of the Companions, 252
 followers of the *tâbi'in*, 252
 Foods, 321
 Footnotes, 229, 244
formal jurisprudence, 334
 forms of evidence, 321
 fornication, 254, 259, 343

France, 6, 28, 30, 248, 293, 327, 343, 358, 365
 free will, 183, 193, 211, 217
 freedom of contract, 29
 freedom of thought, 144
 French Civil Law, 249
 French law, 301, 347
 French legal tradition, 297
 French mandate, 301
 French Mandate, 300, 301, 303
 frustration of purpose, 29
 Fuad Pasha, 249
 Fujayrah, 315, 316
 Fulani *Jihād*, 299
 full *mujtahid*, 149, 176
fundamental aims of the Qur'an, 7, 342
 Fundamental Rights, 275
 funeral of the Prophet, 132
 Funûn al-Hadîth, 63
fuqahâ, 8, 21, 41, 59, 70, 72, 73, 98, 100, 344
al-fuqahâ al-sab'ah, 137
Furû', 39, 54, 63, 76, 167, 180, 222
Furû' al-Fiqh, 39, 55, 185, 222
 Fustat, 137, 177
Fusûl al-Ustrushani, 99
Fusûl al-Badâ'iyi, 60
Fusûl al-Imâdiyyah, 99
Fusûl fi'l-Usûl, 56
 Future of Islamic Law, 345, 349

G

Galata, 242, 258, 364
gambling, 113, 115
 games of chance, 113, 115
Gâyah al-Bayân, 42
Gâyah al-Ikhtisâr, 51
 Gaza, 159
 General *Tabaqât*, 72
 General Zia-ul-Haq, 347, 348
Geschichte der arabischen Litteratur, 78
Ghair al-Mudallal (Not Supported with Arguments)
 Books of Islamic Law, 47
Gharîb al-Fiqh, 70
 Ghatfân, 122
Ghâyah al-Muntahâ, 54
Ghâyah al-Bayân, 228
 Ghilan ibn Abu Ghilan al-Qadari, 197
 Ghilan ibn Muslim al-Dimashqi, 193
 Ghilan ibn Umayya, 36
 Ghulam Ahmad, 201, 202, 203, 204
 glosses, 47, 52, 53, 57
 God will, 212, 216
 God's attributes, 204, 217
 God's Word, 197
 Golden Age of Islamic Law, 144, 323
 Goldziher, 5, 33, 34, 35, 78, 364

good, 23, 54, 83, 113, 115, 116, 133, 150, 159, 176,
 184, 185, 186, 211, 213, 214, 215, 216, 217,
 227, 229, 237, 247, 257, 258, 259, 260, 269,
 277, 278, 334, 345, 352
 goodness, 213, 214
 Grace, 211
 gradual process over time, 115
Grand Majmû', 173
Grand Qâdhî, 300
 Grand Vizier 'Alî Pasha, 248
 Great Moghuls of India, 155
 Great Seljukids, 223, 224
 Greece, 327, 343
 Guardians and Wards Act, 273
 guardianship, 191, 269, 270, 273, 275, 287, 298,
 320
Gulkhane Khatt-i Humayûnu, 243
Gurar al-Ahkâm, 50

H

Habbab Ibnu al-Mundhir, 131
Had, 244
had penalties, 309
hadd, 133, 259, 286, 297, 309
hadd al-baghy, 241
hadd al-qadhîf, 241
hadd al-shirb, 132, 241
hadd al-sirqa, 241
hadd al-zinâ, 241
hadd penalties, 317
hadîth folk, 156, 160
 Hadramut, 162
hâfiz, 179
Hâfiz, 176, 177
 Hârites, 182
 Hâji Khalifah, 9, 40, 41, 42, 43, 44, 45, 46, 49, 50,
 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63,
 64, 65, 66, 68, 70, 71, 72, 73, 74, 75, 77, 78, 84,
 98, 99, 100, 101, 367
hajj, 200, 206, 321
 Al-Hâkim al-Shahîd, 41, 49, 221, 223
 Hâkim Marwazi, 228
halâl, 173
Al-Halâl Wa'l-Harâm fi al-Islâm, 86
halqa, 151
 Halwânî, 48, 222, 223
 Hamdan Qarmat, 205
 Hammâd ibn Sulayman, 151
 Hammâm ibn Munabbih, 135
Hanafi Books without Arguments about the
 Application of *Fiqh*, 48
 Hanafi civil law, 327
 Hanafi *fiqh*, 85, 155, 229, 268, 308, 315
 Hanafi jurists, 30, 72, 160, 221, 222, 225, 234
 Hanafi law, 261, 262, 327

Hanafī madhhab, 39, 148, 169, 209, 223, 224, 226, 230, 234, 236, 245, 305, 325, 326, 327, 336, 338
 Hanafī majority, 303
 Hanafī school, 31, 62, 81, 97, 145, 150, 152, 153, 155, 160, 216, 220, 221, 223, 228, 231, 244, 264, 265, 301, 303, 304, 319, 325, 335, 348
 Hanafī Works on Fiqh al-Qur'an, 65
 Hanafīte Books with Arguments on the Application of Fiqh, 40
 Hanafīte law, 51, 107, 158
 Hanafīte *Tabaqāt*, 73
 Hanafītes, 56, 57, 73, 220
 Hanbalī Books with Arguments on the Application of Fiqh, 45
 Hanbalī Books without Arguments on the Application of Fiqh, 54
 Hanbalī *fiqh*, 290
 Hanbalī *Madhhab*, 60, 328
 Hanbalī school, 162, 165, 289, 319
 Hanbalīte School, 167, 198
 Hanbalīte *Tabaqāt*, 74
haqq, 10, 148
Haqq al-Milkiyyah, 86
harām, 21
 Harawra, 187
 Hārūn al-Rashid, 154
Hārūniyyāt, 153
hasan, 165
 Hasan al-Basri, 143, 177, 183, 193
 Hasan al-Turabi, 308
 Hasan ibn Ziyād, 153, 155
Hasan li Ghairihī, 164
 Hasankeyf, 233
Hashawiyah, 196
 Hashimi family, 159
Hashiyahs, 47, 229
hashr, 7, 342
Al-Hâsil min al-Mahsûl, 58
Havâshî, 229
Hawâlah, 30
 hearts need to be reconciled, 130
 Henry II, 28
 hereditary succession, 134
 heresy, 157, 180, 182, 197
Hidâyah, 30, 40, 42, 50, 100, 227, 228, 229, 254, 265, 266, 268, 329
 hierarchy of norms, 346
 Higher Committees' Council for Islamic Affairs, 354
 Hijaz School of Fiqh, 136, 137
Hijrah, 110, 129, 135, 150, 193
hikmah, 218
 Hilâl ibn Umayyah, 113
Hilyah al-Awliyâ wa Tabaqât al-Asfiyâ, 72
 Himârites, 182
 Hindu minority, 275
 Hindus, 265, 269
hirâbah, 241

Histories of Institutions, 75
 History Books, 75
 holistic evidence, 10, 335
 honorary names, 70, 73
 host state, 349
 hostages, 31
hudûd, 343
Hudûd, 265, 348
 Hudûd Ordinances, 348
 Hugo Grotius, 31
hujjah, 95, 179
hujjah akchasi, 95
Hukuk-i Islâmiyye Ve Istilahat-ı Fikhiyye Kamusu, 47, 355
 Hululites, 182, 183
 human circumstances, 6, 37
 human freedom, 193, 217
 human intellect, 184, 185, 217, 260
 human mind, 216
 human reason, 217
 human rights, 110, 111, 254, 259, 290, 345
 hunting, 321
huqûq al-'ibâd, 22
huqûq allah, 22
 Hurqus ibn Zuhair, 186, 187
hurriyah al-ra'y, 144
 Husayn ibn Muhammad al-Najjâr, 198
husn, 211, 214

I

I'ânât al-Tâlibîn, 52
ibâdah, 321
ibâdât, 21, 89, 319, 320
ibâdhî, 174, 175, 207, 313, 314
 Ibâdhî minority, 313
 Ibâdhî School, 174
ibâdhîs, 174, 175, 207
ibâdhiyyah, 207, 362
 Ibânah, 210
 ibn al-'Âbidin, 229, 238
 ibn al-Haytham, 215
 ibn al-Humâm, 42, 48, 59, 229, 234
 ibn al-Kamal, 69, 225, 228
 ibn al-Nadim, 167
 ibn al-Qâdhî Simawanah, 99
 ibn al-Qayyim, 30, 46, 114, 116, 121, 122, 125, 127, 139, 153, 163, 165, 199, 209, 257, 366
 ibn Battuta, 196
 ibn Hajar al-'Asqalânî, 62
 ibn Hazm, 46, 77, 86, 126, 168, 353, 365, 366
 ibn Jarîr al-Tabarî School, 178
 ibn Khaldun, 21, 44, 45, 53, 59, 75, 125, 139, 140, 168, 215, 366
 ibn Khallikan, 72, 151
 ibn Qudamah, 45, 54

- ibn Qudâmah al-Maqdisî, 58
 ibn Rushd, 44, 45, 77, 215, 366
 ibn Shihâb al-Zuhri, 177
 Ibn Taymiyyah, 69, 86, 165, 199, 209, 366
 Ibrahim al-Halabi, 47, 100
 Ibrahim al-Nakha'î, 151
'iddah, 244
 ideal law, 26
 idols, 24, 115
 IFA, 356
Ifâdah, 58
Ihkâm al-Ahkâm, 58
Ihkâm fi Usûl al-Ahkâm, 168
 Ihktilâf al-Madhâhib, 76
ihqâq-i haq, 341
Ihyâ 'Ulûm al-Dîn, 215
ijâzat at-tadrîs wa'l-iftâ, 32
ijbâr, 185
ijmâ', 21, 22, 122, 130, 149, 160, 161, 167, 170, 173, 257, 338
ijmâ' ahl al-Madina, 157
ijmâ' al-Sahâbah, 122, 175
ijmâli, 22
Ijtihâd, 34, 55, 83, 90, 116, 117, 118, 119, 120, 123, 125, 137, 138, 148, 152, 169, 170, 171, 173, 174, 178, 191, 201, 215, 223, 225, 237, 266, 290, 321, 322, 324, 332, 336, 362
 Ijtihâd of the Companions, 152
 Ijtihâd of the Imâms, 152
Ijtihâdî rules, 20
Ikhtilâf al-Fuqahâ, 77, 178, 369
ikhtiyâr, 193, 219
ikrâh, 29
iktisâb, 219
I'lâ' al-Sunan, 62
i'lâm, 96
I'lâm al-Muwaqqi'in 'an Rabb al-'Âlamîn, 60, 166
ilhâm, 218
 Ilkhanate, 226
 Ilkhanids, 230, 231
'illah, 130
'Ilm al-Fara'idh, 241
'Ilm al-Fatâwâ, 97
'ilm al-hadîth, 61
'ilm al-kalâm, 69, 193
'Ilm al-Khilâf, 222
'Ilm Usûl al-Fiqh, 88
Il-Yaziji, 103
 Imâm Abu Hanîfa, 152
 Imâm Abu Yusuf, 144, 151
 Imâm Ahmed ibn Hanbal, 159
 Imâm al-Ghazzâlî, 216, 225
 Imâm al-Haramain, 57, 210, 225
 Imâm al-Laith, 178
 Imâm A'zam, 39, 150, 151, 154, 155
Imâm Dâr al-Hijrah, 157
 Imâm Dawud ibn 'Ali al-Zâhirî, 166
 Imâm Hussein, 172
 Imâm Ibn Taymiyyah, 45
 Imâm Ja'far al-Sâdiq, 133, 149, 151, 169, 206
 Imâm Mâlik, 86, 133, 144, 149, 152, 156, 157, 158, 159, 160, 162, 170, 172, 208, 359
 Imâm Muhammad, 39, 41, 151, 155, 159, 206, 221, 225, 330
Imâm Muhammad ibn al-Hasan al-Shaybânî, 154
 Imâm Muhammad ibn Isma'il al-San'ânî, 173, 174
 Imâm Nafi', 156
 Imâm Shâfi'î, 39, 55, 57, 133, 150, 157, 160, 162, 163
 Imâm Shawkânî, 173, 174
 Imâm Zaid, 171, 172, 173, 174, 359
 Imâm Zaid ibn 'Ali, 171
 Imâm Zuhri, 136, 156
 Imâm-al-Haramain, 43
Imâmayn, 155
 Imâmites, 182
 Imâmiyyah, 46, 206
Imâms of hadîth, 176
îmân, 181, 182, 185, 187, 197, 208, 216, 342, 362
 Immanuel Kant, 334
 Imperial Council, 102, 237
 imperial decree, 243, 249
 Imperial Records, 103
 impiety, 180, 187
 implementation of Islamic Law, 10, 253, 342, 343
 Implementation of Islamic Law, 341
 implementation of the *Sharî'ah*, 341
 Incoherence of the Philosophers, 215
 Incomprehensible (*Ta'abbudî*) Injunctions, 260
 indemnities, 233
 independence, 42, 50, 57, 60, 223, 273, 274, 275, 280, 281, 284, 285, 286, 290, 294, 296, 298, 299, 301, 302, 303, 304, 307, 314, 315, 316, 324, 326, 330, 341, 347
 independent interpretation, 117, 263
 independent view, 48
 India, 5, 24, 34, 42, 51, 80, 101, 104, 105, 138, 162, 171, 194, 202, 205, 206, 207, 216, 220, 231, 253, 254, 264, 265, 266, 267, 268, 269, 270, 271, 274, 275, 280, 281, 306, 349, 356, 360, 368, 371, 375
 Indian constitution, 269
 Indian Courts, 24
 Indian subcontinent, 262, 348
 individual mind, 218
 individualism, 29
 Indochina, 276
 Indo-Muslim law, 10, 264, 268
 Indonesia, 10, 78, 79, 81, 89, 253, 270, 276, 277, 278, 280, 282, 283, 284, 286, 341, 357, 364, 372
Indonesian legal system, 281, 283
 inductive, 55, 346
 industrialization, 346
 INFAD, 356, 357

- infallibility of the Imâms*, 190
 infallible, 169, 170, 173, 206
 infallible Imâms, 170, 206
 inheritance, 23, 28, 36, 112, 123, 169, 247, 248,
 253, 254, 257, 258, 266, 271, 279, 281, 282,
 283, 284, 295, 301, 314, 317, 320, 321, 329, 349
injunctions in Islamic Law, 35
 injunctions of Islam, 271, 272
 injustice if God, 219
 innovation, 119, 131, 157, 175, 179
 innovations, 136
 inspiration, 112, 218, 295, 352
Institutes, 104, 108, 324, 359, 363, 367
 Institutions of Islamic Fiqh, 356
 Intercession, 212
 internal submission, 181
 international law, 6, 7, 30, 31, 102, 110, 320, 342,
 343, 362
 international private law, 257
 interpretation of the attributes, 193
 Interpretation of the Holy Qur'an, 64
 interpreter, 111, 112, 116, 206, 259
 intoxicants, 112
 intoxication, 254
 invalidity, 25
Iqâlah, 29
Iqnâ fi Hall Alfâz Abu Shujâ, 51
iqtâ', 226
i râb, 64
 Iran, 65, 79, 89, 90, 91, 92, 93, 171, 177, 188, 189,
 190, 191, 192, 196, 205, 206, 253, 255, 292,
 293, 331, 363, 368
 Iraq, 23, 49, 123, 128, 136, 137, 140, 141, 142,
 148, 155, 160, 171, 172, 183, 186, 188, 189,
 190, 192, 194, 196, 199, 205, 210, 224, 249,
 295, 304, 305, 306, 328, 330, 347, 373
 Iraq al-'Ajam, 138
 Iraq al-'Arab, 138
Iraqi Law of Personal Status 1959, 304
'irdh, 233
irjâ', 197
 irreligious Muslims, 181
Irshâd al-Fuhûl, 60, 373
Irshâd al-Sârî li Sharh Sahîh al-Bukhârî, 61
Isâbah fi Tamyiz al-Sahâbah, 72
'Ishâ, 191
 Ishak ibn Râhuveyh, 143
Ishârât ila ma Waqa'a fi Kutub al-Fiqh min al-Asmâ
 wa'l-Amâkin wa'l-Lugât, 71
Islam Hukukunda ve Osmanli Tatbikatinda Vakif
 Muessesesi, 28, 87
 Islam Online, 356
 Islamabad, 39, 272, 328, 368, 370
 Islamic Administrative Law, 343
 Islamic civil law, 325
 Islamic codification, 329
 Islamic economic jurisprudence, 31
 Islamic family law, 256
 Islamic feminism, 253
 Islamic *Fiqh* Academy, 356
 Islamic Golden Age, 31
 Islamic Ideology Council, 272
 Islamic Institute of Civil Justice, 351
 Islamic international law, 31, 343
 Islamic jurisprudence, 6, 10, 30, 35, 37, 39, 54, 55,
 76, 85, 86, 105, 119, 143, 148, 159, 162, 176,
 223, 231, 233, 236, 237, 246, 247, 248, 257,
 294, 303, 307, 321, 322, 323, 324, 332, 351,
 352, 353, 354, 355
 Islamic Jurisprudence Encyclopedia, 351, 354, 355
 Islamic *Lafif*, 28
 Islamic Law Digest, 97
 Islamic Law in Algeria, 313
 Islamic Law in Egypt, 293
 Islamic Law in Ethiopia, 312
 Islamic Law in India, 268
 Islamic Law in Indonesia, 280
 Islamic Law in Iran, 292
 Islamic Law in Iraq, 304
 Islamic Law in Jordan, 305
 Islamic Law in Kenya, 310
 Islamic Law in Kuwait, 306
 Islamic Law in Lebanon, 300
 Islamic Law in Malaysia, 284
 Islamic Law in Morocco, 297
 Islamic Law in Saudi Arabia, 289
 Islamic Law in Somalia, 309
 Islamic Law in Sudan, 307
 Islamic Law in Syria, 302
 Islamic Law in Tunisia, 315
 Islamic Law in Turkey, 317, 318
 Islamic Law in United Arab Emirates, 315
 Islamic Law in Yemen, 316
 Islamic legal administration, 28
 Islamic legal corpus, 227
 Islamic legal history, 332
 Islamic legal system, 259, 320, 335, 348
 Islamic legal theory, 85, 88, 134, 252
 Islamic legislation, 223, 229, 292, 325, 352
 Islamic military jurisprudence, 31
 Islamic Penal Codes, 320
 Islamic penal law, 86, 343
 Islamic personal law, 300, 349
 Islamic property law, 29
 Islamic provisions, 253, 272
 Islamic Renaissance, 346
 Islamic Research Academy, 336
 Islamic Sharī'ah law, 350
 Islamic *Sharī'ah*, 32, 34, 252, 290, 295, 304, 307,
 317, 323, 324, 329, 330, 331, 338, 348
 Islamic System, 273
 Islamization, 92, 272, 274, 308, 309, 328, 347, 348,
 369
 Islamolog, 5, 73, 78

Ismâ'il ibn Ja'far, 206
 Ismâ'ilî doctrine, 206
 Ismâ'ilî Imâmate, 191
 Ismâ'ilîs, 194, 205, 206, 207, 264
 Ismâ'iliyyah, 195, 205, 206
 isnâd, 113
 Istanbul, 2, 7, 23, 26, 28, 36, 37, 39, 47, 87, 94, 95,
 96, 98, 102, 103, 104, 106, 112, 120, 121, 148,
 150, 154, 182, 186, 200, 218, 222, 224, 226,
 230, 232, 234, 235, 238, 244, 248, 249, 255,
 256, 258, 259, 301, 320, 324, 331, 342, 355,
 360, 361, 362, 363, 364, 365, 366, 367, 368,
 369, 370, 371, 374, 375
 Istisbâr, 46, 64
Istisbâr fi ma ukhtulif fihi min al-akhbâr, 64
istihâlâh al-tanfidh, 29
Istihâsân, 152, 153, 157, 160, 173, 257, 326, 332
istinbât, 64
istiqrâ, 55
istishâb, 100, 157, 160, 332
istislâh, 157, 257
Istisnâ', 326
istitâ'ah qabl al-fi'l, 212
 Italia-Turkish War, 296
 Ithâf Zawil-Basâir, 58
ithnâ'Ashariyya, 190
i'tiqâdiyyât, 19, 21, 22
'itiqnâme, 95
Itqân fi 'Ulûm al-Qur'an, 68

J

Ja'farî *fiqh*, 302
 Jâbir ibn Zaid al-Azdi, 207
jabr, 192, 193
Jabriyyah, 192, 193
jadîd, 43, 160
 Ja'far ibn Rabi'ah, 151, 177
Ja'farî fiqh, 169, 170
 Ja'farî school, 55, 152, 169, 170, 171, 289
 Ja'farî Shî'a, 190, 306
 Ja'farî Shî'a minority, 306
 Ja'fariyyah, 10, 148
Jâhil, 175
 Jahmites, 182
Jahmiyyah, 192, 197
 Jakarta, 280, 282
 Jalâl-al-Dîn 'Abdurrahman ibn Abu Bakr al-Suyûti,
 63
 Jalâl-al-Dîn al-Suyûti, 68
Jam' al-Jawâmi', 59, 62
Jamâ'at-i-Islami, 271
 Jamal al-Dîn al-Afghani, 210
Jâmi' al-Bayân fi Ta'wîl Ây al-Qur'an, 64
Jâmi' al-Fusûlayn, 99
Jâmi' al-Kabîr, 45, 49, 153, 228

Jâmi' al-Rumûz, 49
Jâmi' al-Saghîr, 42, 48, 62, 153, 228, 229
Jâmi' al-Sahîh, 19, 61, 62
Jâmi' al-Wajîz or Fatâwâ al-Kardari, 100
Jâmi' Li Ahkâm al-Qur'an, 66
Jâmi' al-bayân fi Ta'wîl al-Qur'an, 178
Jâmi'l al-Sahîh, 175
 Janâhites, 182
Jarîdah al-Adâlah, 106
Jarîdah al-Ilmiyyah, 106
Jarîdah al-Mahâkim, 106
Jarîrî, 179
Jawâhir al-Kalâm, 171
Jawâhir al-Mudhi'ah, 73
jazâ al-siyâsah, 241
jazâ al-siyâsah al-Shar'iyah, 241
jazâ al-ta'zîr, 241
 Jazâ'ir, 313
 Jeremiah, 204
 Jesus Christ, 204
 Jewish personal law, 299
Jibrîl, 260
jihâd, 22, 110, 112, 176, 202, 299, 339, 341, 363
Jihâd, 49, 80, 93, 204
jihâd of the word, 341
Jinâyah, 265
 Jordan, 10, 295, 305, 306, 328, 347
 Joseph Schacht, 5, 34, 35, 338
 Journal of Justice, 106
 Journal of Science, 106
 judicial circulars, 308
judicial court system, 302
 Judicial Decrees, 104
 judicial interpretation, 29
 judicial matters, 117, 265
 Judicial Matters, 118
judicial system, 294, 300, 301, 306, 330
 Judiciary Act 1983, 309
 jurisprudence encyclopedia, 352, 353
 jurisprudential, 176, 257, 324, 335, 352, 355
 jurist's law, 346
 juristic consultant, 342
 juristic preference, 326, 332
Jurjâniyyât, 153
Jurnal Hukum, 289
 jury trial, 28
jus gentium, 257
jus obligationum, 257
 Justinian, 3, 33, 266

K

kabîrah, 185
kadhâan, 26
Kâfi, 41, 46, 50, 153, 221, 223
Kâfi fi Furû' al-Hanafiyyah, 49, 228

- Kâfi fi 'ilm al-Dîn*, 63
kâfir, 181, 149, 212, 187, 207
Kâfiyah fi'l-Intisâr lil-Firqah al-Nâjiyah, 166
 Kaire, 198
kalâm, 87, 193, 211, 213
kalâm al-nafsî, 212
Kanz, 50, 155, 228
Kanz al-'Irfan fi Fiqh al-Qur'an, 67
Kanz al-Daqâ'iq, 50, 155, 228
Kanz al-'Ummâl fi Sunan al-Aqwâl wa al-Af'âl, 62
 Karbalâ, 171, 189, 192
 Karîm al-Hussainî, 207
 Karmathians, 195
Karrâmiyyah, 196, 197
 Kash, 223
Kashf al-Asrâr, 56, 141, 217, 220, 359
Kashf al-Zunûn 'an Asâmi al-Kutub wa'l-Funûn, 75
Kashshâf al-Qinâ' an Matn al-Iknâ', 290
Kashshâf Istilâhât al-Funûn, 71
katb-i sijillât ve sukûk, 95
 Kâtib Chelebi, 75
 Kawâ'id ibn Rajab, 84
 Kenya, 310, 311, 312
Khalîfah, 122, 131, 140, 156, 171, 172, 173, 202, 203
 Khalîfah Abdul Malik, 172
 Khalîfah al-Mansur, 173
Khalîfah al-Masih, 203
khalk al-af'âl, 186, 198
Khâniyyah, 99, 100
Kharâdj, 100
 Khârijite groups, 188, 207
 Khârijites, 182, 186, 187, 188, 207
khâtam al-anbiyâ', 111
 Khatib ibn Abu Balta'a, 130
 Khattâbites, 182
Khawârij, 133, 185, 186, 207, 212
 Khayraddîn al-Zirikli, 73
Khazâin al-Asrâr wa Badâyi' al-Afkâr, 51
Khilâfah, 126, 127, 129, 140, 142, 365
Khizânah al-Fatâwâ, 100
Khizânah al-Muftiyyîn, 99
khul', 296
 Khulafâ al-Rashidûn, 120, 121, 147
Khulâsah al-Fatâwâ, 99
 Khurasan, 136
Khutbah al-Wadâ', 122
 Kifâyah al-Muntahî, 229
Kifâyah fi 'Ilm al-Riwâyah, 63
 King Fahd, 290
 King Faisal, 304
Kisâniyyat, 153
 Kitâb al-Asl, 228
Kitâb al-Bayân Wa'l-Tahsil Wa'l-Sharh we 'l-Tawjih wa'l-Ta'il fa Masâ'il al-Mustakhrajjah, 44
Kitâb al-Buyû', 249
Kitâb al-Fihrist, 74
Kitâb al-Fiqh 'ala al-Madhâhib al-Arba'a, 87
Kitâb al-Fisal fi al-Milal wa'l-Nihal, 77
 Kitâb al-Furûq: Anwâr al-burûq fi anwa' al-furûq, 84
Kitâb al-Hujjah, 43
Kitâb al-Ibâna 'an Usûl al-Diyânah, 211
 Kitâb al-'Ibar we Dîwân al-Mu'tadâ we al-Khabar fi Ayyâm al-'Arab we al-'Ajam we al-Barbar, 75
Kitâb al-'Ilal wa Ma'rifah al-Rijâl, 165
Kitâb al-Irshâd li-Ma'rifah Hadîth Khayr al-'Ibâd, 63
Kitâb al-Kharâj, 41, 76, 144, 154
Kitâb al-Luma', 211
Kitâb al-Milal Wa'l-Nihal, 78
Kitâb al-Muhallâ, 168
Kitâb al-Nawâzil, 222
Kitâb al-Qadhâ, 249
Kitâb al-Tabâqât al-Kabîr, 120
Kitâb al-Tawhîd, 216
Kitâb al-Umm, 42, 160, 161
Kitâb al-Usûl, 56
Kitâb Bayân Awhâm al-Mu'tazila, 216
 Kitâb Majalla al-Ahkâm al-Shar'iyyah 'ala Madhhab al-Imâm Ahmad ibn Hanbal, 85
Kitâb Majmû' al-Nawâzil wa'l-Wâqî'ât, 153
kitâbah, 71
 knowledge of God, 145, 198, 217, 219
Kompilasi, 281, 282, 284
 Kuala Lumpur, 77, 83, 284, 287, 357, 369
 Kufa, 128, 137, 138, 141, 148, 150, 152, 166, 172, 176, 187, 196
Kuffâr, 188
kuffâr an-ni'mah, 207
 Kufic School, 137, 138
 Kufic schools of fiqh, 152
kufir, 181, 187
Kulliyât al-Qawânin, 103
kunyah, 70
Kutub al-Ahkâm, 62
 Kutub al-arba'ah, 113
Kutub Zâhir al-Riwâyah, 48, 153, 155, 324
 Kuwait, 6, 7, 21, 33, 55, 58, 86, 249, 295, 306, 307, 328, 343, 347, 354, 355, 362, 368, 369, 375
 Kuwaiti courts, 307

L

- Lafif* trial, 28
 Lahore Ahmadiyyah Movement, 202, 203, 205
 Lahori Ahmadîs, 203
 Lahoriyyah, 201, 203
 Laith ibn Sa'ad, 149
 Laith ibn Sa'd School, 177
Landraad, 279
 Laos, 276
 last lawbearing prophet, 203, 205

latâif al-fiqh, 49
 law of commodities, 257
 Law of Criminal Procedures, 245
 Law of Evidence, 274
 law of evidence and procedure, 27
 Law of Family Rights 1917, 302
 Law of Family Rights, 327
 law of procedures, 244, 257
 Law of *Shar'î* Procedure, 306
 law reports of records, 289
 Lawmaker, 105, 106, 324
 Ibn Rushd, 45
 Lebanon, 65, 88, 171, 176, 188, 192, 199, 249, 300, 301, 302, 330, 373
 legal answers, 112, 237
 Legal Arrangements, 104
 legal authority, 7, 256, 342
 legal codes, 9, 10, 23, 87, 103, 104, 105, 106, 230, 254, 259, 324, 329, 87, 95, 96, 103,
 legal deductions, 64
legal education, 32, 254
 legal instructions, 112
 legal methodology, 27
 legal reform, 210, 262, 264
 legal scholar, 342
 legal texts, 47, 106, 139, 141, 227, 228, 237, 266
 legislative activity, 114
 legislator, 114, 245, 331, 346
 Lexicological Sources, 70
 Libya, 207, 253, 295, 296, 347
 limits of the legislative power, 244
 lineage, 190, 320
 literal meaning, 166, 195
 literalism, 29
 litigant, 30, 269, 292
 local law, 288, 304, 349
lutf, 211

M

mâ'nawî jihâd, 341
Ma'rudhât, 248, 249, 250
ma'sumiyyah, 190
 Ma'âjim, 70
 Ma'bad al-Juhani, 193
Mabâhith fi 'Ulûm al-Qur'ân, 68
Mabsût, 41, 48, 153, 154, 223, 228
 Macedonian, 304
 Madârik al-Ahkâm and Anwâr al-Qur'an, 65
Madârik al-Ahkâm, 46
madhâhib, 9, 147, 160, 287, 317
madhâhib al-'amaliyyah-fiqhiyyah, 147
madhâhib al-'îqâdiyyah, 147
madhhab, 85, 147, 148, 155, 170, 173, 174, 179, 198, 200, 209, 210, 225, 230, 269, 270, 274, 289, 292, 296, 306, 307, 313, 315, 326, 329, 336, 338, 9, 32, 42, 51, 53, 57, 58, 60, 62, 71, 74, 85, 101, 147, 162, 173, 222, 223, 224, 225, 245, 327, 365
Madhhab al-Bâtîl, 10, 147
madhhab al-Dawudî, 166
Madhhab al-Haq, 9, 147
madhhab al-Zâhiri, 166
 Madinite School, 137, 151, 152
 Madinite schools of fiqh, 152
Madkhal al-Fiqhi al-Âm Ila al-Fiqh al-Islâmî, 86
madrasah, 32, 47, 60, 222, 225, 234, 236, 254, 32, 50, 56, 81
Madrasah of Azhar, 234
Madrasah of Halwânî, 222
Mafâtîh al-Ghayb, 64
Mafâtîh al-'Ulûm, 71
 Maghreb, 53, 61, 140, 158, 176, 188, 191, 297
 magister, 32
 Magistrates Courts, 275
Mahdî, 176, 177, 178, 202, 307
Mahdî, 202, 203, 204, 206
Mahkama Agung, 281, 283
Mahkama Islam Tinggi, 283
Mahkama-i Nizâmiyyah, 246
 Mahomedan, 23, 83, 264
 Mahometan, 23, 264
 Mahommedan, 23, 24, 82, 264, 265, 369
Mahsûl, 58, 59
 Main Doctrines of al-Ash'arî, 211
Majâlis al-Mu'minin, 74
Majalla, 21, 23, 27, 30, 57, 69, 81, 84, 85, 107, 222, 235, 236, 238, 244, 245, 246, 247, 248, 249, 302, 320, 322, 325, 326, 327, 328, 329, 330, 332, 335, 336, 360, 363, 368
Majalla al-Ahkâm al-'Adliyyah, 325, 326, 329, 330, 336
Majalla al-Ahkâm Ash-Shar'iyyah 'Alâ al-Madhhab al-Hanbalî, 328
Majalla-i Ahkâm-i 'Adliyyah, 85, 107, 238, 246
Majâmi' al-Haqâ'iq, 56
 Majdî, 73
Majlis 'Âli-i Tanzîmât, 103
Majlis al-Mab'ûsân, 245
Majlis al-Shûrâ, 290, 302
Majlis Shûrâ al-Dawla, 302
Majlis-i Shûrâ, 272
Majma', 47, 50, 155, 228, 236, 356
Majma' al-Anhur, 47, 50, 236
Majma' al-Bahrain, 155, 228
Majma' al-Bahrayn and Matla' al-Bahrayn, 68
Majma' al-Bahrayn wa Multaqâ al-Nahrayn, 50
Majma' al-Fiqh al-Islâmî, 356
Majma' al-Nawâzil wa'l-Wâqî'ât, 98
Majmû' al-Akbar, 173
Majmû' al-Fatâwâ al-Kubrâ, 45
Majmû' al-Fiqh, 54, 173
Majmû' al-Hadîth, 173

- Majmû' sharh al-Muhadhdhab*, 43
Majmû' ,, 173
Majmû'ah al-Fatâwâ, 222
Majmû'ah al-Fatâwâ al-Shar'iyyah, 86
Majmû'ah al-Muqarrarât al-Tamyiziyyah, 106
Majmû'ah al-Qawânîn al-Misriyya al-Mukhtâra
 min al-Fiqh al-Islâmî, 87
Majmû'ah al-Rasâ'il wa al-Masâ'il, 69
Majmû'ah Rasâ'il al-Ghazzâlî, 69
Majmû'ah Rasâ'il al-Hamawî, 69
Majmû'ah Rasâ'il ibn 'Abidin, 70
makrûh, 21, 26
 Maktabah al-Zâhiriyyah, 39
 Mal Wa al-Hukm Fi al-Islam, 86
 Malabar, 162
 Malatya, 232
 Malay Archipelago, 276
 Malay Peninsula, 276
Malay-Adat laws, 278, 280
 Malayan law text, 277
 Malayan Peninsula, 162
 Malaysia, 93, 276, 277, 278, 284, 285, 286, 287,
 288, 357
 Maldives, 264
Malfûzât, 104, 324
Malik al-Ulamâ, 41
 Mâlik ibn Anas, 44, 61, 137, 140, 143, 156, 158
Mâlikî Books with Arguments on the Application of
 Fiqh, 44
 Mâlikî fiqh, 45, 298, 329
 Mâlikî jurisprudence, 28
Mâlikî law, 53, 89, 261
 Mâlikî *madhhab*, 148
 Mâlikî school, 160, 176, 178, 299
 Mâlikî School, 82, 156, 306, 307, 313, 315, 319,
 335
 Mâlikî Works on Fiqh al-Qur'an, 66
 Mâlikîte school, 53
 Mâlikîte *Tabaqât*, 74
 Malikshah, 104, 224, 324
 Mamlukids, 75, 96, 234
Man lâ Yahduruhu al-Faqîh, 46, 63
Manafi' al-Daqâ'iq, 56
 Manâhil al-'Irfan fi 'Ulûm al-Qur'ân, 68
Manâr al-Anwâr, 56
mandûb, 21, 26
Manhaj al-Mutakallimîn, 57
manhaj al-Shâfi'î, 57
Manhaj al-Tullâb, 52
manshûrat, 308
mansûkh, 115
 Mansurites, 182
manzilah bayna al-manzilatayn, 212, 183, 186
Manzumah of al-Nasafi, 50
Maqâlat al-Islâmiyyîn, 211
Maqâsid al-Shar'îh al-Islâmiyya, 87
 Marash, 232
 Marcel Morand, 314
 Mardin, 233, 249, 369
ma'rifah, 197
 Market Officers, 128
 marks of Islam, 120
 Maronite Christian, 301
 marriage, 95, 112, 169, 173, 183, 198, 253, 254,
 255, 261, 263, 269, 270, 271, 273, 275, 276,
 277, 279, 281, 282, 283, 284, 286, 287, 295,
 297, 298, 299, 301, 302, 305, 314, 320, 322, 82,
 89, 91, 92, 243, 262, 271, 282, 286, 287, 294,
 296, 299, 314, 319, 320, 321, 360, 362
 Marriage Ordinance, 314
mas'alah, 10, 335
masâ'il, 98
Masâ'il al-Mâlikshahiyyah Fil Qawâ'id al-
 Shar'iyyah, 224
Masâbih, 62
Masâdir al-Haqq Fil-Fiqh al-Islâmî, 87
Masâdir al-Tashrî' al-Islâmî fimâ lâ Nass fih, 87
Masâ'il al-Mâlikshâhiyyah Fil-Qawâ'id al-Shar'iyyah,
 104, 324
Masâkîn, 132
Masâlih al-Mursalah, 338
Masâlik al-Afhâm, 46
mashâyikh, 98
Masjid, 125, 127, 157, 162, 172, 179
Masjid al-Nabawi, 125, 127, 157
maslahah, 173, 296, 298
maslahah al-mursalah, 157, 337, 27
maslak al-kitmân, 175
 Masrûq, 151
 master of law, 32
Matâlib Uli al-Nuhâ, 54
matn, 47, 50
 matters of war, 117
 Mâturidî Theology, 216
 Mâturidîs, 216
 Mâturidîtes, 220
Mâturidiyyah, 217, 220, 221, 224
 Mawarâ' al-Nahr, 222
Mawâziyyah, 158
mawdhû', 175
mawlawi, 266
Mawsû'ah al-Fiqhiyyah, 86, 355
 Max Weber, 333
 Maymunites, 182, 183
 Mecca, 22, 52, 109, 112, 128, 134, 137, 139, 140,
 143, 159, 160, 174, 177, 179, 181, 188, 195,
 199, 200, 255, 289, 290, 321
 Meccan period, 109, 115, 175
 Meccan *sharîfs*, 200
 Meccan *sûrahs*, 110
 Medina, 110, 115, 118, 127, 128, 129, 134, 137,
 138, 139, 140, 143, 148, 156, 157, 158, 159,
 160, 169, 171, 172, 177, 179, 189, 200, 208, 289
 Medinan period, 109

- Medinan *sûrahs*, 110
 Mediterranean Sea, 297, 300, 313
 members of the household of the Prophet, 114
Memoirs, 76, 104, 105, 324, 374
 Mesopotamia, 304
 Messiah, 202, 203, 204
 methodology of Islamic law, 144
 Middle East, 4, 28, 30, 34, 90, 104, 253, 279, 292, 294, 318, 335, 362, 363, 368, 371, 372
 middle ground, 185
Miftâh al-Karâmah Sharh Qawâ'id al-Allâmah, 171
Miftâh al-Sa'adah wa Misbâh al-Siyâdah, 75
military court system, 302
 military law, 33, 257
millah al-Islâm, 181
Minhâc al-Sâlihîn, 89
 Minhâj al-Hidâyah fi Tafsîr Âyât al-Ahkâm, 67
Minhâj al-Tâlibîn, 30, 51, 82, 254
Minhâj al-Wusûl ila 'Ilm al-Usûl, 58
Minhâj fi Sharh Muslim ibn al-Hajjâj, 61
 Ministry of Awqaf, 174, 175, 208, 355, 362, 370
 Ministry of Religious Endowments, 354
 minor crimes, 303
 minority rights, 269, 275
 miraculously, 218
Mi'râj al-Dirâyah, 42
Mir'ât al-Usûl, 60
Mirqât al-Wusûl fi 'Ilm al-Usûl, 60
 Mirza Bashîr al-Dîn Mahmud Ahmad, 202
 Mirza Ghulam Ahmad, 201, 202, 203, 204
 Miscellaneous English Sources in Islamic Law, 89
Mishkât al-Masâbih, 62
 mixed method, 59, 248, 332, 335
Mi'yâr al-Adâlah, 241
 Mi'yâr al-Mughrib wa'l-Jâmi' al-Mu'rib 'an Fatâwî A'lâm Ifriqiyah wa'l-Andalus wa'l-Maghrib, 101
Mizân al-Kubrâ, 77
Mizân fi Tafsîrî 'l-Qur'an, 65
 moderator, 29
 modern nation-states, 254
 Mohammedan, 23, 39, 264, 286, 373
 Molla Fanari, 60
 Molla Khusraw, 47, 50, 60, 186, 229, 236, 257, 332, 369
 Mongol Invasion, 226
 Mongols, 226, 230, 345
 Monographic Works, 69
 Monotheism, 216
 Moohumudu, 24
 Morocco, 10, 82, 92, 158, 200, 297, 298, 299, 314
 Moslem, 23, 264
 Mu'adh ibn Jabal, 120
mu'âmalât, 321, 319, 320
 Mu'âwiya ibn Abu Sufian, 134, 186, 187, 188
mu'min, 212
mua'allafah al-qulûb, 130
mu'âmalât, 21, 241, 89, 173, 244
Mu'âmalât of fiqh, 99
 Muammar al-Qaddafi, 296
mubâh, 21
mubham, 219
mubîn, 168
Mudallal (Supported with Arguments) Books of Islamic Law, 40
Mudallal book, 223
Mudallal exegesis, 228
Mudârabah, 242
Mudawwanah, 44, 45, 52, 53, 158, 165, 298
Mufassal, 103, 258
Mufradât Alfâz al-Qur'an, 70
muftî, 32, 51, 157, 159, 177, 201, 335, 342, 357
muftî of Mecca, 159
 Muftî's Office, 96, 98, 230, 360
 Mugaddamât al-Mumahhadât li Bayân ma Aqtadathu Rusûm al-Mudawwanah min al-Ahkâm al-Shar'iyyât wa'l-Tahsilât al-Muhkamât li Ummahât Masâ'ilha al-Mushkilât, 45
 Mughal dynasty, 104
 Mughal Empire, 105, 265, 324, 372
Mughnî, 45, 54, 290
Mughrib fi Tartîb al-Mu'rib, 71
 Mugarites, 182
 Mugnî al-Mukhtâj ila Ma'rifat Ma'âni Alfâz al-Minhâj, 52
Mugnî al-Mustaftî 'an Su'âl al-Muftî, 100
Muhâdarât fi al-Waqf, 86
muhaddith, 179
Muhaddhab, 42, 43, 51, 225
Muhâjirîn, 130
Muhakkimah, 187
Muhallâ, 46, 168
 Muhammad 'Abduh, 201, 210, 254, 328, 330
 Muhammad Abu Zahra, 86, 88, 155, 159, 162, 166, 169, 174
 Muhammad al-Bâqir, 172
 Muhammad al-Mahdi, 191
 Muhammad 'Amer, 327
 Muhammad Amin ibn 'Abidîn, 51
 Muhammad ibn Abd al-Wahhâb, 198, 199, 209
 Muhammad ibn al-Hasan, 41, 48, 49, 75, 153, 154
 Muhammad ibn 'Ali ibn Muhammad al-Shawkani, 60
 Muhammad ibn Ishâq, 140
 Muhammad ibn Karrâm al-Sidjistani, 196
 Muhammad ibn Sa'd, 120
 Muhammad ibn Samâ'ah, 153
 Muhammad ibn Su'ûd, 198
 Muhammad II. Tughlak, 230
 Muhammad Mâturidî, 221
 Muhammad Qadri Pasha, 107, 327
 Muhammad the Conqueror, 47, 232, 236, 238
 Muhammad Zia-ul-Haq, 273
 Muhammad's interpretation, 111
 Muhammadan, 2, 5, 9, 10, 23, 24, 25, 34, 35, 42,

- 43, 62, 78, 80, 81, 82, 83, 84, 89, 97, 101, 105, 255, 264, 265, 266, 267, 268, 276, 278, 329, 339, 361, 375
- Muhammadanische Studien*, 34, 78
- Muhaqqiq al-Hilli, 171, 254
- Muharrar, 45, 51, 52
- Muharrir, 103
- Muhimmah books, 102
- Muhîr, 21, 41, 55, 375
- Muhîr al-Burhâni fi al-Fiqh al-Nu'mâni*, 41, 41, 99, 100
- Muhîr al-Radawi*, 41
- Muhîr al-Sarakhsi*, 41
- muhkam, 219
- muhtasib, 96
- Mujabbirah, 192
- Mujaddid, 201, 202
- Mu'jam al-Buldân, 70
- Mu'jam al-Mu'allifin, 73
- Mujassimah, 196, 197
- Mujassimite, 183
- Mujmal, 103, 258
- mujtahid, 10, 21, 22, 99, 143, 144, 146, 148, 153, 170, 171, 173, 174, 175, 178, 179, 223, 293, 335
- Mujtahid*, 55, 170, 199, 223, 226, 234
- Mujtahid al-Mutlaq*, 199
- Mujtahid Imâms*, 223, 226
- Mukayeseli Islam ve Osmanlı Hukuku Kulliyâtı*, 87
- Mukhtalitah, 44, 52, 53, 158
- Mukhtâr, 50, 171, 228, 238
- Mukhtasar, 30, 42, 45, 48, 49, 50, 51, 53, 54, 59, 161, 165, 225, 229, 329, 335
- Mukhtasar Abu Shujâ', 51
- Mukhtasar Ahkâm al-Qur'an*, 65
- Mukhtasar al-Khiraqi*, 54
- Mukhtasar al-Muntahâ*, 58
- Mukhtasar al-Quduri*, 42, 49, 50
- Mukhtasar al-Wiqâyah*, 49
- Mukhtasar by al-Muzani*, 42
- Mukhtasar fi al-Fiqh*, 49
- Mukhtasar ibn al-Hâjib*, 58
- Mukhtasar of Khalil*, 48, 54
- Mukhtasar of Rabi'*, 161
- Mukhtasar of Sidi Khalil*, 53
- mukhtasars, 47
- Mukhtasars al-Muzani*, 49, 161
- Mukthirûn, 135
- Mulakkkhas al-Ahkâm Ash-Shar'iyah 'Ala al-Mu'tamad Min Madhhab Mâlik*, 327
- Multaqâ al-Abhur*, 47, 50, 236, 237, 329, 335, 365
- Mumbai, 162, 206
- Mumbai State, 162
- Munâkahât*, 319, 320
- mungati', 61
- Munkar, 342
- Muntahâ al-Sûl wa'l-Amal fi 'Ilmay al-Usul wa'l-Jadal*, 58
- Muntakhab al-Husâmi*, 56
- Muntakhab fi Usûl-al-Madhhab*, 56
- Muntaqâ, 153
- Muqaddimah ibn al-Salâh, 63
- Muqillûn*, 135
- Muqni'*, 54
- murâsala, 95
- murder, 216, 259, 291
- Mu'rib, 71
- Murji'ah*, 197
- mursal, 61, 164
- mursal hadîth*, 164
- Murshid al-Hayrân ila Ma'rifat Ahwâl al-Insân fil-Mu'âmalât al-Shar'iyah*, 108, 327
- Murshid al-Mughtaribîn*, 88
- Musailamah, 121
- Musailamah al-Kazzâb, 198, 199
- musallam, 239
- musannaf, 61, 136, 145
- Mushabbihah*, 196, 197
- Mushaf*, 260
- mushrik, 198
- mushtabah, 219
- Mushtabih fi Asmâ' al-Rijâl*, 70
- Muslim arbitrator, 351
- Muslim Brotherhood, 358
- Muslim community, 64, 124, 175, 181, 182, 183, 187, 215, 251, 349, 353
- Muslim countries, 5, 6, 20, 23, 104, 251, 252, 253, 254, 264, 298, 325, 329, 343, 349
- Muslim Family Law Ordinance, 273
- Muslim Family Laws Ordinance, 263, 270, 271, 276
- Muslim Fulani Usman dan Fodio, 299
- Muslim heritage, 328
- Muslim ibn Khalid al-Nanji, 159
- Muslim individual, 7, 254, 341, 342
- Muslim jurists, 3, 8, 71, 230, 244, 332
- Muslim minorities, 85, 285, 292, 349, 358, 275, 351
- Muslim personal law, 253, 265, 268, 269, 270, 273, 274, 275, 308, 361
- Muslim population, 192, 270, 279, 253, 349
- Muslim reformers, 254
- Muslim scholars, 3, 5, 10, 24, 72, 73, 78, 87, 95, 109, 117, 120, 122, 125, 144, 147, 195, 254, 323, 338, 339, 347
- Muslim Studies*, 78
- Muslim territories, 251
- Muslim ummah, 349
- Muslim world, 30, 136, 155, 168, 177, 188, 190, 251, 254, 255, 262, 326, 345
- musnad, 61, 136
- Musnad*, 152, 163, 165, 175
- Musnad al-Imâm Ahmad*, 61
- musnad collections, 136
- Mussalman, 24, 83, 108, 359
- Must'alias, 206

Mustadrak al-Wasâ'il wa Mustanbat al-Masâ'il, 64
 Mustafa al-Siba'i, 353
 Mustafa al-Zarqa, 354
 Mustafa Kemal, 318
Mustakhrajah min al-Asmi'ah al-Masmû'ah, 44, 158
mustanbatah, 21
Mustasfâ, 57, 58, 225
mut'ah, 169, 191, 298
mutakallim, 58
Mu'tamad, 57, 58, 327
mutaqaddimûn, 208
mutasawwif, 176
mutawallî, 28
mutawâtir reports, 185
Mu'tazila, 169, 183, 184, 185, 193, 198, 211, 212
Mu'tazilî, 10, 148, 163, 173, 183, 185, 216
Mu'tazilî school, 184, 173
Mu'tazilite, 57, 173, 183, 195, 212, 219, 185, 213, 214, 219
Mutûn, 155, 227
Mutûn al-Arba'ah al-Mu'tabarah, 155, 228
mutûn al-dirâyât, 49
mutûn mu'tabarah, 50
Muwâfaqât fi Usûl al-Sharî'ah, 60
Muwahhidûn, 209
Muwatta', 61, 144, 156, 157, 158, 159
 mysticism, 78, 215

N

Nâfi' ibn ul-Azraq, 188
nâfilah, 119
 Nahdatul 'Ulamâ', 357
nâib, 95
 Najd, 109, 199
nâjî, 181
 Najid, 198
 Najjârites, 182
Najjâriyyah, 198
 Napoleonic code, 254, 301
 narrator, 178, 185
Nasb al-Râyah li Ahâdith al-Hidâyah, 62
nâsikh, 115
nâsikh wal-mansûkh, 115
naskh, 42, 115, 115
nass, 48, 51
Natâyij al-Wuqu'ât, 75
 National Fatwâ Committee, 357
 nationality theory, 343
 Natural Philosophers, 195
naw, 63
Nawâdir, 41, 44, 153
Nawâzil, 98, 153
Nayl al-Awtâr, 62, 174
Nayl al-Murâd min Tafsîr Âyât al-Ahkâm, 65

Al-Nazariyya al-'Âmma lil-Mûjabât wal-'Uqûd fi al-Sharî'ah al-Islamiyya, 87
 neorevivalism, 328
 Nepal, 264
 Netherlands, 7, 342, 344, 362
 Nigeria, 80, 253, 299, 349
Nihâyah al-Matlab fi Dirâyat al-Madhab, 43
Nihâyah al-Mukhtâj ila Sharh al-Minhâj, 52
Nihâyah fi Gharîb al-Hadîth wa'l-Athâr, 70
Nikâh Mut'ah, 191
Niqâyah, 49
 Nisâbur, 143
 Nizâm al-Mulk, 76, 104, 224, 324
Nizâm-e-Mustafa, 273
 Nizâmiyyah courts, 246
Nizâmiyyah Madrasah, 222, 224
 Nizârî Muslims, 206
 nomadism, 37, 150
 non-combatant civilians, 31
 non-Muslim believers, 181
 non-Muslim country, 254, 343
 Norman law, 28
 Normans, 28
 North Africa, 28, 78, 128, 162, 188, 194, 205, 253, 297, 313, 314, 315
 North America, 351
 North Kurasan, 196
nubuwwah, 7, 342
 Nukhbah al-Fikar fi Istilâh Ahl al-Athar, 63
 nullity, 26, 270
Nûrayn, 129
 Nusairi, 300, 194
Nusairiyyah, 194

O

obeying contract, 172
 obligations, 186, 206, 207, 259, 297, 320, 322, 355
 obsession, 185
Offence of Qadhf, 274
Offence of Zinâ, 274
 Official Gazette, 106
 Ömer Nasuhî Bilmen, 47
 oneness of God, 185
 Opinions of the Companions, 130
 Opponents of *Qadar*, 183
 Organization of *Shari'ah* Courts, 306
 orientalist, 5, 35, 73, 78
 origin of Islamic law, 25
Origins of Muhammadan Jurisprudence, 35, 79, 373
 orphans, 132
Osmanli Qânûnnâmeleri, 23, 87, 95, 96, 97, 103, 360
 Ottoman Civil Code, 246, 302, 327
 Ottoman documents, 104

Ottoman Empire, 73, 79, 232, 294, 296, 301, 305, 306, 315, 317, 326, 329, 361
 Ottoman Law of Family Rights, 301, 303, 304, 305
 Ottoman Legal Codices, 240
 Ottoman Majalla, 305, 329
 Ottoman Mount Lebanon, 300
 Ottoman Qânûnnamas, 103
 Ottoman State, 10, 23, 39, 42, 47, 50, 51, 56, 59, 60, 69, 75, 81, 87, 94, 96, 97, 102, 103, 105, 106, 107, 198, 199, 200, 224, 226, 227, 228, 229, 231, 233, 234, 235, 236, 237, 243, 247, 248, 249, 251, 257, 259, 316, 318, 324, 325, 329, 335, 345

P

pacta sunt servanda, 30
Padishah, 105, 233, 237
 Pahlavi dynasty, 292
 Pakistan, 5, 10, 83, 85, 92, 94, 138, 155, 167, 171, 192, 205, 206, 216, 220, 253, 263, 264, 268, 270, 271, 272, 273, 274, 275, 336, 345, 346, 347, 348, 369, 375
 Pakistani Family Courts, 273, 275
 Pakistani law, 347
 Pakistani parliament, 205, 347
 Palestine, 30, 90, 94, 122, 196, 249
Pancasila, 283, 284
par excellence of the *hadiths*, 160
paradigm of Shari'ah, 20
 Paris, 250
 Parliament, 245, 272, 308, 348
 Parthian, 304
 peace, 22, 31, 114, 131, 204, 274, 303, 321, 341, 344
 penal law, 6, 109, 113, 257, 259, 317, 84, 120, 319, 320, 341, 360, 372
 Penal punishments, 321
Pengadilan Agama, 281, 283
 people of opinion, 141
 people of the literal sense, 168
 Period of *Mujtahidin*, 142
 Period of the Companions, 120, 121
 period of the Prophet, 9, 111, 116, 351
 Period of the Righteously Guided Caliphs, 120, 121
 Period of the *Tâbi'in*, 133
 Personal Names, 70
 personal status law, 265, 306, 316, 326, 327, 329
Pey Akcha, 244
 Philippines, 253, 276, 277
 philosophers, 65, 169, 211, 212, 215
 piety, 156, 176, 216, 259
 Pilgrimage, 321
pirate coast, 315
 Place Names, 70
 pluralism, 279, 345

poisoned weapons, 31
 political conflicts, 134
 political legislator, 346, 348
 polygamy, 253, 258, 262, 263, 271, 282, 292, 297, 298
 Polygamy, 36, 262
 poor tax, 320
 positive action, 341
 Possibility of the beatific vision, 212
 power of the intellect, 184
 prayers, 22, 26, 111, 113, 115, 117, 118, 131, 181, 186, 191, 194, 199, 204, 206, 214, 260, 321
 predestination, 186, 193, 211
 pre-eternal, 212
 pre-eternity of the Qur'an, 212
preserver of the Shar'iyah records, 96
 presidential instructions, 281, 283
 presumption of continuity, 332
 Primary sources, 257
primary sources of legislation, 253
 Prime Ministerial Ottoman Archives, 98, 102, 103, 232, 233, 257, 371
 principle of *tadrîj*, 115
Principles and Precedents of Muhammadan Law, 265, 267
 Principles of Islamic Jurisprudence, 5, 55, 83, 91, 265
 principles of legal interpretation, 348
 principles of the *Shari'ah*, 348
 prisoners of war, 31
 Private Council, 24
 private international law, 31
 private law, 10, 96, 104, 224, 235, 257, 320, 321, 324
 probate, 269
 Problem of Reason and Revelation, 212
 prohibition, 115, 183, 214, 260
 prohibition of alcohol, 115
 Promised Messiah, 204
 pronouncement of divorce three times, 133
 property law, 29, 320
 Prophet's *Ijtihâds*, 117
 Prophetic *Sunnah*, 115
 Proponents of Predetermination, 192
 prostrations, 260
 protection of women, 31, 275
 provincial high court, 347, 348
provisional constitution, 305
 public international law, 31
 public law, 76, 96, 154, 180, 224, 236, 238, 257, 259, 277, 320, 321, 6, 75, 321, 345
 Public Laws of Prussian States, 331
 public order, 269, 275, 277, 341
 Punishment for Drinking Alcohol, 132
 punishments, 25, 105, 201, 253, 259, 291, 297, 322
 Punjab Laws Act, 267
 Putrajaya, 284, 357

Q

- qadar*, 183
 Qadarites, 182, 183
Qadariyyah, 183, 192, 193
Qadâyâ Fiqhiyyah Mu'âsirah, 88
qadhîf, 259, 297
Qâdhî, 28, 42, 44, 45, 57, 58, 60, 74, 95, 105, 138, 144, 151, 153, 154, 158, 184, 229, 231, 234, 236, 266, 303, 305, 306, 308, 329, 333
Qâdhî Ahmad ibn Abu Dawud, 184
Qâdhî al-Qudhât, 30, 57, 144, 154, 305, 308
Qâdhî 'askar, 200, 236
Qâdhî justice, 333, 335
Qâdhî Sahnun, 44, 158
Qâdhî Shûrâyh, 138, 151
Qâdhikhân, 49, 153
Qâdhis' Courts, 309
Qâdhiyaniyyah, 201, 202, 203
qadîm, 43, 160, 212
Qadri Pasha, 108, 302, 303, 326, 336
Qamus al-A'âm, 73
Qansu Ghawri, 234
Qânun, 22
Qânûn al-'Uthmani, 105
Qânûn al-'Adl wal-Insâf lil-Kadâ' 'ala Mushkilât al-Awkaf, 108
Qânûn al-Ahwâl al-Shakhsiyyah, 303
qânûn of Aurangzeb, 105
Qânûn Umumî, 104
Qânûn-e-Shahadat, 274
Qânûnnâme, 23, 95, 105, 232, 233, 237, 257, 324, 371
Qânûnnâme-i Rusûm, 95
 Qarahanids, 221, 223, 225
Qarâmita, 195, 196, 368, 373
 Qarmathians, 194, 195
Qarmatî, 216
 Qarmatian communities, 196
 Qarmatian party, 195
 Qarmatids, 221
qasâmah, 109
Qâsim ibn Muhammad, 137
qat' al-yad, 130, 232
qat' al-tariq, 241
 Qatar, 295, 347, 356
Al-Qawâ'id al-Fiqhiyyah, 248
Qawa'id al-Kulliyah al-Fiqhiyyah, 84
Qawa'id al-Tahdîth min Funûn Mustalah al-Hadîth, 63
Qawâ'id al-Wusûl ila Ma'rifah al-Usûl, 56
Qawânîn, 104, 105, 324, 327, 373
Qawânîn al-Mulkiyyah li al-Dawlah al-'Aliyyah, 246
qawl, 45, 48, 51
Qawl al-Mukhtâr fi Sharh Gâyah al-Ikhtisâr, 51
qawl mukharraj, 48, 51
Qirâd, 30
qisâs, 232, 259, 309, 244
 Qisâs and Diyât Ordinance, 274
qiyâs, 3, 22, 28, 123, 141, 147, 151, 152, 153, 156, 157, 160, 161, 163, 164, 165, 166, 167, 170, 173, 123, 136, 152, 167, 257
qubh, 185, 211, 214
qunûl, 207
Qunyah al-Munyah, 99
 Qur'anic Fiqh, 65
 Qur'anic injunction, 342
 Qur'anic exegesis, 122
 Quraysh, 159
Qurrah al-'Ayn, 52, 57
qurû', 122
Quyûd al-Khâqâniyyah, 103

R

- Ra's al-Khaymah, 315, 316
Ra'y-i Madhmûm, 123
ra'y-i memdûh, 123
ra'âyâ, 106
Rabi'ah al-Ra'y, 156, 157
Radd ala Siyar al-Awza'i, 176
Radd al-Muhtâr, 22, 51, 100, 229, 365
Radd al-Tahdhîb fi al-Jadal, 216
Radd al-Wâfir, 165
Rafidhî, 172
 Râfidites, 182
rafidiyya ghlûlât, 196
Rahmat al-Ummah fa Ikhtilâf al-A'immah, 77
rajaz, 53
rajm, 232, 273
Ramz al-Haqâiq, 50
 ransoms, 31, 233
 rape, 291
Raqiyyat, 153
Rasâ'il, 69, 100
Rasâ'il ibn al-Nujaym, 69
Rasâ'il Shurunbilali, 70
Rasâ'il al-Zayniyyah fi Fiqh al-Hanafîyyah, 69
Rasâil Shaikh al-Islam Abu al-Su'ûd Effendi, 69
Rashîd Ridhâ, 210, 254, 328
Rashidûn, 125, 126, 128
Râshidûn caliphs, 190
rasm al-qismah, 242
rasm-i qismah, 95
rasm-i sijil, 95
Rawâyi' al-Bayân Tafsîr Âyât al-Ahkâm min al-Qur'an, 65
Rawd al-Tâlib, 52
Rawdhah al-Nadhir Sharh Majmû' al-Fiqh al-Kabîr, 43, 173
Rawdhah al-Nâzir wa Jannah al-Manâzir fi Usûl al-Fiqh alâ Madhhab al-Imâm Ahmad ibn Hanbal, 58

real estate, 224, 244
 reason, 5, 7, 22, 24, 33, 78, 97, 121, 122, 123, 128,
 130, 134, 141, 145, 148, 161, 169, 179, 183,
 184, 185, 186, 193, 195, 197, 208, 211, 212,
 213, 215, 216, 217, 219, 223, 225, 236, 246,
 256, 259, 260, 277, 291, 318, 321, 332, 342
 Reason, Knowledge and Law, 217
 recession, 29
Record Clear, 218
 References for Islamic Law, 39
 Reformers, 252, 256
 Refrain from Paying *Zakâh*, 131
 refugees, 31
 registration of marriage, 286, 314
 reinterpretation of Islamic law, 348
 Religion of the Federation, 285
Religious Court system, 284, 302
 religious courts, 253, 279, 281, 283, 284, 288, 289,
 294, 301, 306, 283, 285
 Religious Opinions and Answers, 97
 religious ordinances, 255
 religious rituals, 112
 religious rules, 22, 130, 268, 341
 religious texts, 195
 Renovation of *Shari'ah* Law, 256
 repudiation, 262, 263
res judicata, 29, 30
revealed laws preceding the Shari'ah of Islam, 32
 revelation, 25, 35, 36, 109, 112, 116, 117, 119,
 120, 122, 138, 164, 184, 185, 186, 194, 195,
 196, 203, 212, 213, 215, 216, 217, 218, 219,
 260, 265, 276, 4, 34, 112, 185, 213
 Revolution, 191, 292, 293, 297, 307
 Revolutionary Command Council, 296, 308
 Revolutionary Courts, 293
 right of asylum, 31
 righteous predecessors, 210
 righteously guided Caliphs, 125
 rights, 22, 28, 29, 110, 120, 231, 252, 270, 273,
 275, 277, 284, 290, 292, 293, 297, 317, 334,
 345, 353
ringgit, 287
Risâlah, 19, 25, 53, 55, 57, 65, 88, 109, 151, 160,
 161, 352, 359, 372, 373
Risâlah al-Tanbîh ala Ghalat al-Jâhil wa al-Nabih,
 69
Risâlah fi Talab al-Yamin ba'da Hukm al-Mâlikî, 70
Risâlah fi Waqf al-Nuqûd, 69
 Ritual Purification, 321
 rituals, 111, 117, 251, 118
 robbery, 30, 291
 Roman jurisprudence, 33
 Roman law, 10, 33, 34, 35, 248
Rum Seljukids, 224
 Russia, 155, 224, 318
 Russian government, 329

S

Sa'îd ibn al-Musayyab, 137, 140
 Sabah, 285, 286, 287
 Sabbâbites, 182
 Sabuktekin, 226
 sacred books, 255
 Sacred laws, 36
 sacred sayings, 114
 Sa'd ibn Abu Waqqas, 129
 Sa'd ibn Mu'az, 118
Sadad courts, 299
 Sa'd-al-Dîn Mas'ud ibn 'Umar al-Taftâzani, 59
 Sâdiq al-Mahdi, 308
Safâratnâmah, 76
Sahâbah, 120, 121, 122, 123, 125, 130, 131, 132,
 133, 138, 139, 140, 141, 142, 147, 151, 208
Sahâbi, 120
Sahâbiyyah, 120
Sâhib al-Takhrîj, 225
Sâhibayn, 155
sahîfah, 135
Sahîh al-Bukhârî, 61
Sahîhain, 122
salaf, 201, 208, 209, 174, 208, 209
Salaf al-sâlih, 208, 210
salaf al-Sâlihîn, 210, 208
Salafi, 209, 210
salaf-i sâlih, 201
 Salafis, 209, 252
salafism, 201, 208, 376, 198, 200, 201, 208, 209
Salafiyya, 210, 201
Salafiyyah, 198
salâh, 22, 26, 183, 191, 321
 Salâh al-Âlam bi Iftâ' al-Âlim and Jawâb an al-
 Afyon, 69
salтанah, 134
 Şam, 198
sanjaq, 106
 Sanskrit, 284
 Santillana David, 326
 Sanusiyya, 296
saqîfah, 130
 Sarakhsi, 41, 56, 154, 155, 222, 223, 228, 373
 Sarawak, 285, 286, 287
Sasanî, 37
 Sasani Empire, 37
 Sassanid, 304
 Saudi Arabia, 94, 192, 253, 255, 289, 290, 292,
 328, 334, 374, 375
 Saudi law, 290
 Sava Pasha, 34, 35, 59, 226, 373
sawâd al-Iraq, 123
sawm, 22, 321
 Sayf-al-Dîn al-Âmidî, 58
 sayings of the Companions, 161
 sayings of the Prophet, 113, 170, 195

- Sayyed Qutb, 227
 scholar of *hadīths*, 179
 School of Ahl al-Athar, 139
 School of Ahl al-Ra'y, 139
 school of *ra'y*, 151
 School of the People of *Hadīth*, 139
 School of the People of Opinion, 141
 schools of Islamic law, 114
 schools of law, 9, 37, 146, 147, 150, 290, 293, 322, 343, 346, 92, 137, 141, 147, 148, 155, 158, 162, 165, 169, 178
 Schools of thought, 147
 science of *Fiqh*, 137, 55
 science of legal opinions, 97
 seal of prophets, 111
 Second Coming of Christ, 202
 second marriage, 262
 secondary matters, 6, 36, 255
 secular, 4, 24, 85, 239, 243, 251, 253, 254, 269, 279, 280, 283, 284, 288, 289, 292, 293, 294, 295, 297, 298, 318, 319, 333, 341, 351, 358
 secular courts, 253, 283, 288, 289, 297
 secular legal system, 341
 secular system, 298
 secularism, 110, 274, 345
Secularists, 251, 256
 Seljukids, 96, 223, 224, 225
 Semerqand, 223
 Serakhs, 223
 Serkiz Karakoç, 103, 105, 232
 Seveners, 205
sha'â'ir, 120, 260
shafâ'ah, 212
Shâfi'î Books with Arguments on the Application of *Fiqh*, 42
Shâfi'î Books without Arguments on the Application of *Fiqh*, 51
Shâfi'î jurists, 225, 234
Shâfi'î Madhhab, 162, 225, 226
Shâfi'î School, 43, 78, 81, 159
Shâfi'î Works on *Fiqh* al-Qur'an, 66
Shâfi'î School, 52
Shâfi'î *Tabaqât*, 73
 Shah Waliyyullah, 266
Shaikh al-Islam, 69, 97, 98, 249
 Shaikh al-Islam Abdurrahman (Dâmâd) Effendi, 237
 Shaikh of Dar' iyyah, 198
 Shaikh of Najd, 198, 199
Shams al-A'immah, 221, 222
 Shaqâ'iq al-Nu'maniyyah fi 'Ulamâ al-Dawlah al-'Uthmaniyyah, 71, 73
shar', 19, 321
Shar' al-Sharîf, 233, 321
shar' principles, 296
Shar' evidence, 123
Shar'-i Sharîf, 19, 240, 241, 243, 257, 258
 Shar'iyyah court, 327
Shar'iyyah Records, 240, 241, 242, 243, 257
 Sharafuddîn Yahya al-San'ânî, 173
Sharâyi' al-Islam, 46, 171, 254
Sharâyi' u Man Qablanâ, 33
sharh, 43, 47, 67
Sharh al-Kabîr, 54
Sharh al-Manâr, 56
Sharh al-Talqîn for Qâdhî Abdulwahhab al-Baghdadi, 45
Sharh Âyât al-Ahkâm, 68
Sharh Muntahâ al-irâdât, 290
 Sharhu Ma'ânî al-Âthâr, 77
Shar'î Advocates, 306
Shar'î transactions, 325
Sharî'ah Law, 243, 362
 Sharî'ah Politics, 320
Sharî'ah Records, 96, 97
Sharî'ah rules, 239, 240, 241, 242, 260
 Sharî'ah system, 351
Shar'iyyah Sijilleri, 257
Sharî'ah, 4, 6, 7, 9, 19, 20, 21, 22, 23, 25, 26, 27, 32, 34, 35, 49, 55, 59, 86, 87, 91, 93, 100, 105, 110, 114, 116, 117, 120, 123, 129, 131, 134, 136, 138, 141, 142, 144, 146, 149, 150, 152, 154, 155, 156, 158, 159, 160, 162, 164, 166, 169, 171, 174, 176, 177, 178, 179, 193, 199, 206, 211, 226, 232, 236, 237, 244, 245, 246, 247, 251, 253, 254, 256, 257, 258, 260, 261, 263, 265, 266, 267, 268, 271, 272, 273, 282, 283, 284, 286, 287, 288, 289, 290, 291, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 315, 317, 318, 320, 321, 324, 325, 329, 330, 336, 337, 338, 341, 342, 343, 347, 348, 353, 358, 368, 371, 372, 375
Sharî'ah Appeal Court, 287
 Sharî'ah Appellate Bench, 272
 Sharî'ah Bench, 273, 347
Sharî'ah Benches, 273
Sharî'ah court, 303, 347
 Sharî'ah Court of Appeal, 297, 299, 306
Sharî'ah courts, 253, 261, 282, 283, 286, 287, 291, 294, 296, 298, 302, 303, 304, 305, 306, 308, 315
Sharî'ah Courts of Appeal, 300
Sharî'ah Criminal Code, 286
Sharî'ah decrees, 55, 237, 244, 246, 247, 257, 321
Sharî'ah High Court, 287
Sharî'ah injunctions, 256
Sharî'ah law, 105, 256, 257, 263, 290, 305, 321, 329
Sharî'ah policies, 257
Sharî'ah principles, 23, 105, 257, 308
Sharî'ah Subordinate Courts, 287
 Sharî'ah values, 21
Sharî'ah verdict, 131
 Sharîf Gâlib, 200
Shar'iyyah, 21, 33, 85, 87, 94, 95, 96, 327

- Shar'iyah court, 95, 87, 94, 95
 Shar'iyah records, 94, 95, 96
Shar'iyah Sijilleri, 87
 Sharjah, 315, 316
 Shaykh 'Abdullah al-Salim al-Sabah, 306
 Shaykh of Islam, 163
Shaykhayn, 155
 Sheikh Mahmood Shaltût, 191
 Sheikh Nizâm, 231
 Shi'a *hadith*, 191
 Shi'a *Hadith* Books, 63
 Shi'a minority, 316
 Shi'a movement, 189
 Shi'a Muslims, 125, 128, 133, 169, 188, 190
 Shi'a population, 189
 Shi'a theological beliefs, 190
 Shi'a theology, 190
shī'at 'Alī, 190
 Shihâb-al-Dîn Ahmed ibn Idris al-Qarafi, 58
Shi'î Books with Arguments on the Application of *Fiqh*, 46
Shi'î Books without Arguments on the Application of *Fiqh*, 54
Shi'î jurisprudence, 170
Shi'î theology, 170
Shi'î Works on *Fiqh* al-Qur'an, 67
 Shi'ism, 113
 Shi'ite Ibâdhiyyah, 354
 Shi'ite Imâmiyyah, 354
 Shi'ite Schools, 195
 Shi'ite *Tabaqât*, 74
 Shi'ite Zaidiyyah, 354
 Shirwani-zâdah Rushdu Pasha, 249
 Shuaibia, 128
Shurûh, 228
 Si'ird,, 233
sidq, 185
Siete Partidas, 31
sifât, 186
 Siffin, 186, 189, 210
Sihâh al-Sittah, 145
sijil akchasi, 95
Sijillât-i Shar'iyah, 94
 Sikhs, 269
 Singapore, 82, 276, 280, 286
sirah, 116
Sirâjiyyah, 267
 Six Authentic Books of *Hadith*, 145
 Six Books, 61, 62
Siyar, 31, 33, 92, 320, 373
Siyar al-Kabîr, 153, 228
Siyar al-Saghîr, 153, 228
Siyar al-Saghîr wa'l-Kabîr, 49
 siyâsah, 262
Siyâsah al-Shar'iyah, 165, 257, 320, 321
Siyâsatnâmah, 76, 104, 224, 324
 skepticism, 215
 slaughtering, 321
 slavery, 36, 258
 small mistakes, 117
 social justice, 110, 255, 284
 socialism, 309
 Soheib Bencheikh, 358
 Sokoto, 299
 Sokoto *Jihâd*, 299
 Solomon, 204
 Somali, 309, 310
 Somalia, 347
 sophistry, 331
 sources for Islamic law, 5, 6, 35, 109, 115, 120, 121, 136
 South Asia, 93, 264, 265, 266, 274, 275
 Southeast Asia, 10, 91, 276, 277, 278, 280, 284
 Spain, 32, 44, 72, 158, 169, 176, 194, 343
 Sri Lanka, 264
 State Consultative Council, 302
 State High Courts, 270, 300
 state legislation, 287, 297, 314
 statutory legislation, 281
 stoning, 113, 232, 253, 273
 study circle, 151
 Su'udbinEs-Su'ud, 200
subashi, 96, 235
Subh al-A'shâ, 75
 Sublime Porte, 301
Subul al-Salâm, 62, 174
 successor, 31, 122, 125, 128, 169, 190, 202, 203, 205, 265, 286
 Successors of the Companions, 133
 Successors to the Successors, 208
 Sudan, 90, 108, 110, 253, 255, 307, 308, 309, 327, 347, 356, 364
 Sufian al-Thawrî, 149, 176
 Sufian ibn 'Uyaynah, 141, 143, 157, 159, 163, 179
 Sufian ibn 'Uyaynah School, 179
 Sufism, 114, 209, 373
 Suharto, 283
suhuf, 135
 Sulaiman the Lawmaker, 232, 238
sulh, 344
 Sultan Ala'addîn Tarmashirin, 230
 Sultan Melikshah, 223, 224
 Sultan Muhyi-al-Dîn 'Alamgir Ewrengzib, 101, 231
 Sultan Sulaiman the Lawmaker's Law, 239
Sun of Imâms, 221
Sunan Abu Dâwud, 61
sunan al-hudâ, 119
Sunan al-Tirmidhi, 62, 180
Sunan ibn Mâjah, 62
Sunnah, 3, 6, 8, 20, 22, 25, 31, 55, 76, 111, 114, 115, 116, 119, 120, 122, 124, 130, 131, 135, 136, 137, 139, 140, 141, 145, 150, 152, 157, 159, 160, 161, 164, 166, 170, 173, 174, 176, 190, 208, 209, 213, 256, 257, 258, 259, 262,

263, 271, 272, 290, 295, 320, 338, 346, 352, 356
Sunnah of the Messenger of Allah, 122
Sunnah of the Prophet, 25, 111, 116, 119, 120, 136, 152, 338
 Sunnî *hadîth*, 129, 191
 Sunnî Muslim, 10, 125, 147, 183, 215, 301, 316
Sunnî Schools Of Law, 147, 369
 Sunnî Theological Schools, 208
 supervisor, 29
 suprasensible, 213
 Supreme Court, 106, 237, 263, 270, 272, 275, 281, 283, 293, 297, 298, 300, 302, 307, 308, 314, 316, 317, 333, 347, 348
 Supreme Court of Appeal, 97
Supreme Judicial Council, 272, 290, 291, 292
 surnames, 70, 72
 suspension of the share of the people, 130
 Sweden, 343
 Swiss family law, 256
syari'ah, 10, 276, 277, 278, 279, 280, 288
 Syariah Court system, 279
syari'at, 276
 Syria, 33, 85, 86, 94, 128, 134, 136, 148, 159, 162, 168, 171, 176, 188, 199, 302, 303, 304, 327, 328, 330, 354, 373
 Syrian Law of Personal Status, 262, 303
 system of Islamic Law, 319, 322

T

ta'addud al-ahkâm, 332
Ta'limât al-Saniyyah, 96
ta'zîr, 257, 321
ta'zîr penalties, 257
Ta'sîs al-Nazar, 77
taba' al-tâbi'în, 252, 125, 133, 209
Tabaqât al-Hanafiyyah, 73
Tabaqât al-Hanbaliyyah, 74
Tabaqât al-Mâlikiyyah, 74
Tabaqât 'al-Sahâbah wa'l-Tâbi'în, 72
Tabaqât al-Saniyyah fi Tarâjim al-Hanafiyyah, 73
Tabaqât al-Shâfi'iyyah, 73
Tabaqât ibn Sa'd, 72
Tâbi'î, 133, 176
tâbi'în, 134, 137, 196, 208, 252, 125, 133, 138, 141, 151, 172, 208, 209
Tabsîrah al-Hukkâm fi Usûl al-Aqdiyyah wa Manâhij al-Ahkâm, 53
Tabyîn al-Haqâiq, 50
Tadhâkir, 76, 360
Tadhkirah al-Fuqahâ, 54, 171
Tadrîb al-Râwî Sharh Taqrîb al-Nawawî, 63
Tadwîn al-Hadîth, 135
tafrî', 58
tafsîlî, 21
Tafsîr al-Mîzân, 65

Tafsîr al-Kabîr, 64
Tafsîr al-Khamsemi'at Âyât al-Ahkâm, 67
Tafsîr al-Tabarî, 178
Tafsîr Âyât al-Ahkâm, 67
Tahâfut al-Phalâsiphah, 215
Tahâfut al-Tahâfut, 215, 366
tahâruj, 241
Tahdhîb, 46, 52, 156, 161
Tahdhîb al-Ahkâm, 46, 64
Tahdhîb al-Asmâ wa'l-Lugât, 72
Tahdhîb al-Asmâ wal-Lughât, 71
tahqîq, 58
tahrîr, 50
Tahrîr, 59, 232, 233, 234, 238, 371
Tahsil, 58
Tâj al-Tarâjim, 73
Tajnis wal-Mazî, 99
Tajrid, 225
Takfîr, 187, 188
takhayyur, 254, 296, 298
taklîf, 194, 219
talâq, 262, 263, 271
Talâq Thalâthah, 133
talfîq, 254, 336, 337
Talibat al-Talabah, 71
ta'liq, 47
Ta'liqât, 229
 Talmudic jurisprudence, 33
Talwih li Kashf Haqâ'iq al-Tanqîh, 55, 59, 184, 186, 211, 212, 215, 217, 220, 261
Tanbîh, 43, 51
Tanqîh al-Fusûl fi al-Usûl, 58
Tanqîh al-Usûl, 59
Tanwîr al-Absâr wa Jâmi' al-Bihâr, 51, 229
tanzîh mutlaq, 212
Tanzîmât, 90, 96, 102, 105, 106, 235, 238, 243, 244, 245, 246, 247, 324, 329
Tanzîmât Movement, 238
Tanzîmât Period, 243
Tapu-Tahrîr Defterleri, 232
taqlîd, 174, 181, 226, 262, 167, 211, 226
Taqlîd-i mahdh, 226
Taqrîb fi 'l-Fiqh, 51
Taqrîb wa'l-Taysîr ila Ma'rifat Sunan al-Bashîr al-Nadhîr, 63
taqrîr, 47
Taqrîr, 56
Taqrîr wa'l-Tahbîr, 59
taqwâ, 216
Taqwîm al-Adillah, 56, 222
Taqwîm al-Wakâyi', 106
Tarâwîh, 191
Tarhan, 226
Ta'rifât, 71
Târikh al-Madhâhib al-Islâmiyyah, 86, 173
Târikh al-Rusul wa al-Mulûk, 178
Târikh al-Tabarî, 178

- Târikh al-Tamaddun al-Islâmî*, 79
Târikh al-Tashrî' al-Islâmî, 87, 226
Târikh Baghdâd, 72
Târikh 'Ulamâ al-Andalus, 72
Târikh-i Jawdat, 75
tartîb, 41, 99
 Tartîb al-Madârik wa Taqrîb al-Masâlik li Ma'rifat A'lâm Madhhab Mâlik, 74
Tartîb al-Musnad, 175
tasdîq, 197
tashbîh, 196
Tashîh al-Furû', 54
 Tashkopruzâdeh, 73
 tasks of a caliph., 343
 Tatar, 165
Tâtârkhan, 100
Tawdîh li Hall Ghawâmid al-Tanqîh, 59
tawhîd, 7, 110, 185, 342
 Tawqî'î Abdurrahman Pasha, 324
tawqîfî, 260
 tax law, 233
ta'zîr, 105, 235, 239, 242, 325
ta'zîr penalties, 106
Ta'zîrât, 105
 temporary marriage, 191
 Terms of Islamic Law, 70
 Terms of the Qur'an, 70
 Terms of the Tradition, 70
territorial theory, 343
testimony, 29, 113, 124
 texts, 3, 4, 5, 30, 47, 50, 51, 83, 120, 121, 122, 136, 139, 163, 164, 168, 173, 226, 227, 228, 229, 231, 232, 236, 262, 264, 265, 266, 267, 268, 277, 280, 289, 329, 330, 332, 336, 337, 346, 348
 Thailand, 162, 276
Thâlih, 155
Thâni, 155
thawâb, 148
 Thawrî, 46, 140, 142, 143, 149, 157, 176, 177
 Thawrî *madhhab*, 177
 Thawrî School, 176
 theft, 30, 130, 233, 253, 254, 259, 297
 Theological Schools, 2, 180
 theoretical references, 39
 Three Divorces, 133
 Tigris, 304
 Tihamah, 109
timar, 106
 time of purity, 122
 Timurid dynasty, 104
 title deed registration, 244
 Title-Deed Registry Books, 103, 233
 tolerance, 266, 345
 Tulunids, 234
 traditional legal schools, 252
 Traditionalists, 171, 252
 Traditions of Prophet Muhammad, 60, 321
 transactions, 21, 85, 112, 167, 173
 transcendence of God, 193
 transitional laws, 292
 Transoxiana, 196
 treatise, 31, 32, 41, 43, 82, 85, 88, 104, 168, 267, 324, 342, 366, 373
 trustee, 28
 truster, 28
 Tughluk Timur Khan, 230
Tuhfat al-Hukkâm fi Nukat al-'Uqud wa'l-Ahkâm, 53
 Tuhfat al-Mukhtâj li Sharh al-Minhâj, 52
 Tunisia, 104, 207, 263, 314, 315
 Tunisian Code of Personal Status, 298
 Tunisian Law of Personal Status, 262
 Tunisian *Majalla Itizâmât*, 326
 Turk Hukuk Tarihi, 22, 29, 31, 32, 87, 121, 146, 148, 155, 159, 162, 166, 227, 234, 238, 244, 245, 257, 318, 360
 Turkey, 2, 30, 76, 87, 102, 155, 171, 188, 216, 220, 249, 253, 256, 263, 268, 317, 318, 330, 349, 357, 367, 375
 Turkistan, 40, 65, 221, 223, 225, 227, 228, 329
 Türkiye Cumhuriyeti, 317
 tutelage, 320
Tuzukât-i Timur, 104, 324
 Twelve Imâms, 174, 190
 Twelve Tables, 33
 Twelver Ja'fari school, 292
 Twelver Shi'as, 206
 Twelver Shi'a, 169, 170, 171, 190, 191
 Twelver Shi'ite law, 108
 Twelver Shi'ites, 206, 254
 two imâms, 52
- ## U
- UAE, 315
udûl, 125
ulamâ, 65, 66, 68, 73, 104, 119, 140, 142, 171, 209, 271, 272, 293, 356
ulamâs of Hijaz, 140
ulu al-amr, 258, 231, 233, 236, 237, 244, 245, 246, 247
 Ulûm al-Hadîth, 63
Ulûm al-Hadîth wa Mustalahuhû, 63
Ulûm al-Qur'an, 68
Ulush, 226
 Umar, 30, 37, 53, 54, 55, 56, 58, 73, 90, 91, 121, 122, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 137, 138, 139, 140, 142, 155, 156, 165, 173, 174, 178, 184, 186, 187, 188, 189, 211, 212, 215, 217, 220, 238, 261, 308, 329, 363
 Umar al-Bashir, 308
 Umar Hilmi, 329

'Umar ibn 'Abdul-'Azîz, 136, 140
 Umayyad Caliphate, 133
 Umayyad dynasty, 133
 Umayyad Caliphate, 147
Umdah, 57, 60, 361
Umdah al-Qâri, 60, 61
Umm, 39, 42, 43, 162, 315, 373
ummah, 124, 180, 277, 131, 164, 172, 203, 324, 337
 Ummahât, 44, 53, 158
 Ummayad dynasty, 190
 unanimous reports, 119
 unbelief, 181, 182, 187, 188, 203
Undang-Undang Melak, 277
unified judicial system, 285, 294
 Uniform Family Code, 274
 United Arab Emirates, 315
 United Kingdom, 285, 349, 358
 universal law, 109
 universal message, 110
Uqûbat, 319, 320
Al-Uqûd al-Durriyyah fi Tanqîh al-Fatâwâ al-Hâmiyyah, 100
Al-Uqûd al-Musammât fi al-Fiqh al-Islâmî, 86
Uqûd Rasm al-Muftî, 70
Urbûn, 244
'urf, 9, 109, 307, 332, 22, 23
'urfî huqûq, 238
'Urfî Law, 259
 Urwa ibn 'Udaiyya, 187
'ushr, 22
usûl, 4, 6, 10, 22, 58, 60, 76, 147, 149, 153, 168, 176, 180, 267, 322, 335, 21, 33, 48, 55, 57, 63, 80, 83, 85, 88, 91, 109, 117, 153, 166, 167, 180, 182, 183, 184, 185, 186, 188, 190, 194, 195, 222, 251, 259, 326, 332, 359, 361, 365, 367, 368, 369, 370, 375
Al-Usûl al-Âmmah Lil-Fiqh al-Muqâran, 88
usûl al-dîn, 147, 181
usûl al-fiqh, 4, 6, 57, 58, 60, 76, 149, 168, 176, 267, 21, 33, 55, 57, 58, 60, 80, 83, 85, 88, 91, 109, 117, 166, 222, 251, 259, 326, 332, 365, 368, 370, 375
Usûl al-Fiqh al-Islâmî, 88
Usûl al-Fuqahâ, 56
Usûl al-Hadîth, 63
Usûl al-Hadîth 'Ulûmuhû wa Mustalahuhû, 63
Usûl al-Pazdawi, 56
Usûl-Arba 'ah, 46
Usûfî, 170, 171
 usurpation, 30
 Uthbiyyah, 44, 158
 Uthman, 29, 101, 122, 126, 127, 128, 129, 132, 140, 173, 185, 188, 189, 235, 359
 Uthman Beg, 235
Uyûn al-Masâil, 98
Uyûn al-Masâil al-Muhimmah, 101

V

Al-Vajîz fi Usûl al-Tashrî' al-Islâmî, 88
 Vasâil al-Shî'a, 46
velâyat-i faqîh, 191
 Vietnam, 276
 voluntary, 119, 120

W

Al-Wâdihah, 44, 158
Wafayât al-A'yân wa Anbâ'u Abnâ al-Zamân, 72
Al-Wâfi, 50
 Wahba Mustafa al-Zuhayli, 85, 355
 Wahnâbi state, 289
 Wahnâbism, 198, 209
 Wahnâbite movement, 200
 Wahnâbite sect, 199
Wahnâbites, 198, 199, 200
wajh, 43, 48, 51, 64
wâjib, 21
Wajîz, 43, 123, 225, 259, 375
Al-Wajîz fi Usûl al-Fiqh, 88
walâyah, 207
Wali al-Amr, 237
Waq'anuwis, 75
Waqf, 28, 69, 81
Wâqî'ât, 97, 98, 99, 153, 222
Al-Wâqî'ât al-Husâmiyyah, 98
wâqif, 28
 War Booty, 132
Waraqât, 57
 Warfare, 32, 321, 359
 Warren Hastings, 265, 266
Wasâ'il al-Shî'a, 64
 Wâsil ibn 'Atâ, 172, 183
Wasîl, 43, 225
Wasîl al-Muhîb bi Aqtâr al-Basîl, 43
Al-Wathîqah al-Madina, 110
 wayfarer, 132
 weak *hadîth*, 164
 Weberian perspective, 333
 Well of Zamzam, 195
 West Pakistan, 273
 Western Asia, 300, 304
 Western Europe, 24, 348
 Western invaders, 345
 Westernization, 243, 253
Wilâyah, 129
 will of God, 25, 198
wine, 113, 115, 123, 133
Wiqâyah al-Riwâyah fa Masâil al-Hidâyah, 49, 50, 155, 228, 229
wisdom, 36, 141, 150, 182, 193, 218, 219, 255, 258, 260, 332, 358
 witnesses, 29, 113, 138, 259, 321

Working Muslim Mission, 203
 World Fatwâ Management and Research Institute, 356
 World War I, 301, 304, 305, 318
 World War II, 253, 296
 worldly affairs, 117, 118, 119, 214, 218
 worship, 22, 105, 111, 112, 117, 118, 119, 120, 167, 180, 193, 194, 198, 251, 259, 260, 261, 298, 321, 322, 351
 Worship, 118, 194, 320
 writing down *hadiths*, 135
wuqûf, 207

Y

Yahya ibn Sharaf al-Nawawi, 43, 51, 61, 63, 72, 101
 Yamamah, 198
Yang di-Pertuan Agong, 287
 Yathrib, 112
yaya, 239
 Yazdgerd III, 127
 Yazidites, 182, 304
 Yemen, 120, 128, 136, 137, 139, 173, 174, 192, 199, 206, 316, 317, 373
Yemeni Law of Personal Status, 317
 Yusuf al-Qaradawi, 86, 357, 358

Z

Zâd al-Ma'âd, 46, 166
zâhir, 166, 194
Zâhir al-madhhab, 48, 153
Zâhir al-riwâyah, 98, 50, 153, 155
 Zâhir Baybars, 234
Zâhirî Books with Arguments on the Application of

Fiqh, 46
 Zâhirî school, 168, 169, 166
 Zâhirî Works on Fiqh al-Qur'an, 68
 Zâhirism, 168, 169
 Zâhirite school, 166, 168
Zâhiriyyah, 100, 166
 Zaid ibn 'Ali, 54, 149, 171, 174
 Zaid ibn Thâbit, 121, 124, 129
 Zaidî *fiqh*, 174
 Zaidî *madhab*, 173
 Zaidî school, 150, 173, 174, 316
 Zaidî Works on Fiqh al-Qur'an, 68
 Zaidites, 182
 Zaidiyyah, 10, 148, 173
 Zaidiyyah School, 171
zakâh, 22, 36, 115, 181, 182, 199, 258, 320, 321, 131, 274
 Zakâh and Ushr Ordinance, 274
 Zakariyâ al-Ansari, 52
 Zaki Badawi, 358
zallah, 117
Zât, 186, 194
Zawâ'id, 62
Zayl Tabaqât al-Hanbaliyyah, 74
zinâ, 259
 Zinâ Ordinance, 274
 Ziyâdât, 41, 44, 49, 228
Ziyâdât al-Ziyâdât, 49
 Zoroastrian, 270, 292
 Zoroastrianism, 221, 292
 Zoroastrians, 168, 269
 Zubdah al-Bayân fî sharh Âyât Ahkâm al-Qur'an, 67
Zuhr, 191
 Zulfikar 'Ali Bhutto, 348